THE

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THE WARD TRIAL.[1]

Upon the 2d of November, 1853, in a school-room in a public street in the city of Louisville, in broad daylight, in the presence of a large number of pupils and their instructors, Matthews F. Ward, a son of one of the most respectable inhabitants of that city, accompanied by his brother, Robert J. Ward, Jr., armed with a bowie-knife, took the life of William H. G. Butler, the principal of the school, by shooting him through the body with a pistol. The high previous character of all the actors in this tragedy, some of whom are not altogether unknown in this section of the country, the atrocity of the homicide, which, from the first accounts of it, seemed to be a cold-blooded, deliberate and cruel assassination, created not only in Kentucky, but throughout the United States, a deep and absorbing interest.

The excitement subsided, at least in localities remote from the scene of the slaughter, as soon as it was understood that Ward and his brother had been arrested, and in due course of law would be indicted and tried for murder.

[1] A Full and Authentic Report of the Testimony on the Trial of Matt. F. Ward, certified to be correct by Thomas D. Brown, Clerk of Hardin Circuit Court; William Alexander, former Commonwealth Attorney for the Hardin District; and Judge Alex. Walker, of New Orleans; — with the Speeches of Gov. Crittenden, Gov. Helm, T. F. Marshall, Esq., and Nathaniel Wolfe, Esq.; and the reply of Alfred Allen, Esq., Attorney for the Commonwealth. Reported by A. D. Richardson. New York: D. Appleton & Co., 346 and 348 Broadway. 1854.

The public seemed willing to suspend its judgment until judicial investigation should afford the means of deliberate and intelligent opinion upon the merits of the case. The people of Kentucky, more familiar with *affairs* of this nature than the citizens of those regions where the "code of honor" does not prevail, reposed apparently upon the integrity and ability of their courts, and upon the inclination of these tribunals to administer justice. Although the excitement in Louisville seems never to have entirely subsided, so far as our knowledge extends, it was much moderated by the expectation and the hope that an impartial trial would vindicate the demands of public justice, and reassure the sense of private security which a homicide thus publicly perpetrated upon a highly esteemed and well-known individual, naturally in some degree tended to disturb.

Upon the 18th day of April, 1854, Matthews F. Ward, jointly indicted with his brother Robert for the murder of Mr. Butler, was placed upon his separate trial before the Circuit Court for the County of Hardin, at Elizabethtown, the Hon. J. W. Kincheloe presiding; the venue having been changed from Jefferson County, in which Louisville is situated, on account of the prejudice against the prisoners supposed to exist there. Thirteen counsel were engaged in the cause, of whom four appeared for the Commonwealth, and nine for the prisoners. The trial extended through nine days, during which eighty-seven witnesses were examined, of whom sixty-six were for the defence. Amongst the latter were the father and mother of the prisoner, *the brother who was jointly indicted*, the widow of the deceased, and thirteen of his pupils, of ages varying from fourteen to twenty years. Four days were consumed in the examination of witnesses, and four more in the "speeches" of counsel, of which four were for the prisoner, and four for the government. The case, after a charge from the presiding judge which might have occupied ten minutes in the delivery, was committed to the jury at five o'clock in the afternoon of the eighth day, and at the opening of the court on the ninth day, the jury returned their verdict of "Not guilty." Matt. F. Ward was accordingly discharged, "borne from the room in a fainting condition," and a *nolle prosequi* entered upon the indictment against his brother.

The announcement of this verdict created in Louisville

the most intense indignation. The jury, the prisoner, the "swift witness" for the defence, and even some of the counsel, were burnt in effigy. Mr. Ward's house, prudently vacated, was attacked by a mob and injured by fire. A public meeting was held, in which the trial and the parties concerned in it were severely denounced, and resolutions sympathizing with Mr. Butler's family passed. This meeting was remarkable not only for its extraordinary numbers, being the largest ever held in Louisville, but equally so for the character of the persons who composed it and directed the proceedings. It was not a tumultuous mob, nor assembled by persons ever ready to take advantage of any occasion of public excitement. It was mainly constituted of, and altogether directed by, intelligent, educated and influential citizens, who appeared to feel, with solemn conviction, that the verdict had done foul wrong to the name and honor of Kentucky, and had converted the proceedings of justice into a contemptible farce. By a not unnatural process of mind, this deeply-seated, irrepressible indignation, turned itself against the prisoner's counsel, and especially against the distinguished gentleman who volunteered his services. To the eloquence and ability of this gentleman, as well as to his high standing and commanding character, the result of the trial, though with no sufficient reason, seemed to be mainly attributed. Deputations and addresses from all parts of the State have urged him to resign his seat in the U. S. Senate; a society in a neighboring State withdrew its invitation to him to officiate upon some public occasion; a convention of medical gentlemen at St. Louis, who, before the trial, would have deemed themselves honored by his presence, so far forgot their self-respect as openly to insult him.

The "amiable and interesting young gentleman" who had been the "unfortunate cause" of Mr. Butler's death, did not escape similar demonstrations of popular anger. His own State was no longer a safe place of residence, and he left it. Returning to his native city, after a few months' absence, he is again compelled to flee. Steamboat captains are unwilling to convey him; hotel-keepers refuse to harbor him; towns warn him to leave their limits; even Arkansas, not entirely unaccustomed to the lawless use of the pistol and the bowie-knife, prefers that he should not remain within her borders. The curse of Cain cleaves to him. He is a fugitive and a vagabond in the earth, pro-

claimed, wheresoever he wanders, in tones of stern condemnation and with demonstrative unanimity, an acquitted felon.

Whence arises this long continued and unmistakeably sincere indignation? How happens this extraordinary condemnation by Kentuckians of their bar, their jury, and their courts? Whence arises what Matthews Ward's friends — for he still possesses some personal friends — characterize as relentless persecution? The cause must be sought beyond the character and standing of the individual or his family; beyond those of his victim — beyond even the atrocity and boldness of the crime.

A mild, amiable, and peaceable Christian, but still courageous and determined man, whose misfortune caused him to take life justifiably in self-preservation, whose conscience accuses him of no crime, who patiently submitted to five months' imprisonment without a murmur, who manfully stood his trial and was triumphantly acquitted, would endure more quietly the pains of incarceration, the agonies of suspense, the torments of a trial, than the manifestations of horror and loathing which meet him wheresoever he turns. Such detestation is especially hard for him to bear, as it seems to be deeper and the more unequivocally expressed by those in whose immediate neighborhood he had acquired the splendid character which was proved upon his trial. In the supplicating tone of a deeply injured and persecuted man, he addresses from New Orleans a card "to the editors of newspapers in the United States, requesting their silence until after the report of his trial shall be published in New York." To this he confidently appeals as containing his perfect vindication. To the public judgment, formed after a perusal of this report, he is probably willing to submit. It is prepared by his own friends, with a view of showing that, though undeniably great the misfortune, there was no crime in his slaughter of Professor Butler.

This report is now before us, in the shape of a pamphlet of one hundred and seventy-six pages. Its imposing title we have already given in full. It is supposed to be authenticated by the following certificate, which adds little, if any thing to its value, and certainly indicates that its source is suspicious. "In consequence of the general interest felt in the result of this trial, and the numerous comments that have been made upon it, it has

been thought best to give the public full assurance of the reliability of the appended report. The following certificate from well-known and disinterested gentlemen has therefore been given: —

Elizabethtown, Ky. April 26th, 1854.

This is to certify that we have heard all the testimony given in the case of the Commonwealth *v.* Matt. F. Ward; and on carefully examining the report of the same, made by Mr. A. D. Richardson, of Cincinnati, have no hesitation in pronouncing it full, impartial, and accurate in every particular.

ALEXANDER WALKER,
Editor of the New Orleans Delta.

THOS. D. BROWN,
Clerk of the Hardin Court.

WM. ALEXANDER, of Brandenburg, Ky.,
Member of the Hardin County Bar, and formerly Prosecutor for the Hardin Circuit."

To this report then we refer to ascertain, if possible, whether the remarkable excitement produced by the acquittal of the prisoner, can be accounted for from the proceedings in the court-room; and from the evidence as there reported, we compile the following history of the case.

Previous to the first of November, 1853, Mr. and Mrs. Ward, and their son, Robert J. Ward, Jr., went to Cincinnati on a visit. Upon the first of November, William Ward, a younger son, had been punished at school, by W. H. G. Butler, the principal teacher, under the following circumstances. Matt. related that Willie, when he entered the school-room, had some nuts in his pocket, and gave some of them to several of the boys who asked for them; that he had just given all away, when Prof. Butler gave the signal for order, and the hours for study commenced; that after a short time Prof. Butler seeing the hulls on the floor inquired what boys had eaten the nuts; that one of the boys refused to tell, when Prof. B. sent into the other room for his strap, and said he would ascertain who had eaten them, and whipped the one who would not inform him; one of the boys said that Willie gave him the chestnuts after the recitation order was given; Willie said that he did not, but the boy persisted that he had; another little boy spoke up and said that Willie gave *him* chestnuts, but that it was before the signal for order had been given; that Mr. Butler before he whipped William — which he did very severely — said that he was compelled to punish him, not only for giving away the chestnuts, but also for lying, and that the boy who ate the chestnuts was not whipped at all. This statement was made by William to the prisoner late in the afternoon of the first of Novem-

ber, and it was coupled with the request — "Brother, I wish you would go round and see Mr. Butler about it; I don't care so much about the whipping, but I would rather die than that he should believe me, or the boys should call me, a liar"; Matthews concluded to go, but deferred his visit until the next day on account of the lateness of the hour at which he learned the facts.

Upon the second of November, at about nine o'clock in the morning, Matthews Ward purchased of a gunsmith in Louisville a pair of pocket pistols, the barrels of which were only two and a half inches long, but still capable of shooting "through an inch plank two feet from the muzzle," having first stipulated that they should be loaded by the gunsmith. They were accordingly loaded each with a buckshot, the largest ball that would fit them, and otherwise "fully prepared for use." From the gunsmith's shop he proceeded directly to his father's house, stopping by the way to converse about the repairs of a musical box. Upon reaching his home, he met his father and mother and his brother Robert, all of whom had just returned from Cincinnati. Matthews then related to his mother the story of William's punishment, and in his presence. It was this narration which Mrs. Ward gave in evidence at the trial, and it is the only evidence in the case as to the fact that William was punished at all or called a liar. It does not appear that Mrs. Ward thought it worth her while to examine William to discover whether there might not have been a little exaggeration as to the effects of the whipping.

After making this statement, Matthews remarked, that he would go to the school-house and "*ask an explanation and apology*" from Mr. Butler. The father offered to go, but Matthews insisted upon going himself, for the rather unsatisfactory reason that "Butler was a young man, and this had been done during the father's absence"; Mr. Butler, he added, "was a gentleman, and would do what was right *by making in the presence of the school the apology a gentleman ought to make.*" Mr. Butler had been a private teacher in Mr. Ward's family for "twenty months, and was a great favorite there. He was engaged to re-enter his position as private teacher," but protracting his visit to Europe longer than was anticipated, the engagement was annulled.

Just before Matthew started, he was cautioned by his

mother to be calm, and to remember that excitement made him sick. He replied, "I *am* perfectly calm. I know Mr. Butler is a just man, and will do what is right. I am only going to ask a civil question, and expect a civil answer." Mrs. Ward then suggested that it would be better for him to take some person with him; to which he replied that there was no necessity for it; that he expected no difficulty with Mr. Butler. Mrs. Ward then observed, that Mr. Sturgus (Butler's assistant) was his enemy. Just then Robert entered the room, and Mrs. Ward suggested that *he* should accompany Matthews. To this the latter "impatiently" agreed, telling Robert to get his hat and come with him.

From Mr. Ward's house they went directly to the school-room, without stopping by the way. While proceeding thither, Matthews told Robert that he was going round to "*ask an apology of Mr. Butler for whipping William very unjustly and severely*," and that he did not wish either William or Robert to interfere either by word or action. To this William said, "You know, brother, that Mr. Butler is a stronger man than you are, and Mr. Sturgus has a big stick there"; to which Matthews replied, "I apprehend no difficulty. I believe Mr. Butler to be a just man, and have always found him such." He then told them not to interfere *unless both Sturgus and Butler attacked him.*

They entered the school-room at ten o'clock. What there transpired is thus narrated by Robert.

"When we reached the school-house, William went in for his books, and on being called for, Prof. Butler came out of his room with a lead pencil in his hand; we bade him good morning, and he bowed in reply—

Matt. I have called around, Mr. Butler, to have a little conversation with you.

Butler. Walk into my private room.

Matt. No: the matter about which I wish to speak with you occurred here, and this is the proper place to speak of it. Mr. Butler, what are your ideas of justice — which do you think the worse, the little boy who begs chestnuts and scatters the hulls on the floor, or my brother William, who gives them to him?

Butler (at the same time buttoning up his coat to his throat, and putting the pencil into his pocket). I will not be interrogated, Sir.

Matt. I have asked a civil question, and have a right to a civil answer, — which is the worse, the contemptible little puppy who begs chestnuts and then lies about it, or my brother William, who gave them to him?

Butler. There is no such boy here.

Matt. Then that matter is settled. I have another question to ask you. You called my brother a liar, and I must have an apology for it.

Butler. I have no apology to make.

Matt. Is your mind fully made up about that?

Butler. It is. I have no apology whatever to make.

Matt. Then you must hear my opinion of you. You are a d—d scoundrel and a coward.

Butler sprang forward, pushed my brother back against the door, and struck him; am not quite positive as to the number of blows, but I saw him strike twice; he then fired the pistol; I did not see the pistol until he fired; Mr. Sturgus then came out of his room and advanced a few steps; I was excited, and thought he had something in his hand with which he was going to attack brother; I drew my bowie-knife, and went two or three steps towards him, telling him to stand off; he then retreated; when we left the school-house, Matt. said he had forgotten the pistol, and I went back for it; the knife I wore on that occasion was one I had worn for six months constantly; at the time the pistol was fired, my brother was crushed back against the wall, in a corner, as far as he could get, and bent down; Butler then had him by the collar or cravat, and did not let go for a second, I should think, after the pistol was fired; during the conversation I was very close to the parties — within half a foot of each; when Butler pushed my brother back, it took them some four or five feet from me; I observed the whole affair very attentively."

Upon cross-examination he added:

"We all bowed to Butler when we entered; my brother's hands were then by his side; noticed that he held his hat in his left hand and gesticulated with his right after we entered; when Butler sprang forward, think it was his left hand that he seized Matt. with, and the right that he struck him with; do not feel quite positive in regard to this, as I was considerably excited; I know that he struck him twice; may have struck him three times or even four; my brother put his hat on when he told Butler he must hear his opinion of him; and when Butler seized and struck him, he then first put his hand in his pocket; did not know that my brother had pistols until I saw him take that from his pocket; have carried arms since I was fourteen years of age; having always associated with men older than myself, have done so, fearing I might get into a difficulty sometimes, and need them to defend myself."

This is the history of the origin, progress, and termination of the affair, compiled from the testimony of the father, mother, and brother, as published in that report of the trial to which Matt. Ward himself appeals. We have no hesitation in saying, after a careful consideration of all the evidence, as there published, and a full examination of the arguments in defence, and with no information as to the facts derived from any other source, that a more predetermined, deliberate and cruel assassination has seldom been submitted to judicial investigation. Such seems to be the almost universal public opinion; such must be the judgment of every person who peruses this report with an unbiassed mind. If the "code of honor" has so seared his conscience that remorse for the bloody deed which sent to a sudden and untimely grave a young, an honorable, an amiable and a useful man, which desolated a happy home,

widowed a fond, an affectionate, and a youthful wife, deprived an only child of his father, and wrung a noble brother's heart with sorrow too deep to utter, shall add no sting to his anguish, this victim of ungoverned pride must still pass the remainder of his miserable life, certain of universal condemnation as an acquitted murderer.

The trial is remarkable, not only for the atrocity of the deed for which the prisoner was indicted, the clear and distinct proof both of the homicide and of the crime, and the unwarrantable verdict of the jury. It is equally so for the number and eminence of the counsel employed on either side, the extraordinary propositions of law enunciated by the defence, the admission of testimony against all precedent and in violation of the plainest principles of law, the bold misstatement of the evidence almost entirely unchecked, either by the counsel for the prosecution or the court, the unusual and extravagant appeals to the *mercy* of the jury, and to their passions and prejudices, and more than all for the entire absence of any instructions from the court upon the principles of law, which should guide and govern the jury in their consideration of the issue.

The counsel undoubtedly understood their jury, and the selection of those who were to speak in behalf of the prisoner, was probably made with reference to the peculiar powers of each. One counsel was selected apparently to make the "stump" speech in defence, for his argument deserves no better appellation; another was probably influential because he had "often addressed them in the jury-box, and from the rostrum, on the stump, and in the muster-field," and perhaps brought to bear upon the case a large amount of local reputation for profound knowledge; another represented the bar of Louisville; while the national reputation and commanding abilities of the counsel who volunteered, could not fail to obtain from the jury respectful and sympathizing attention.

So many counsel, all speaking upon one side of a case, is rather an unusual occurrence. In this section of the country we believe it never occurred. We know, however, of no objection to be reasonably advanced against the practice, if advocates do not fear to weary the patience of those who are compelled to listen, and the court deem that the magnitude of the issue justifies so large an expenditure of public time. Still less do we consider that the reproaches cast upon the eminent gentleman who volun-

teered his services in the defence either deserved or justifiable. It seems to be thought in certain quarters that every lawyer should sit in judgment in a criminal case before undertaking to defend it; that he should follow public clamor instead of opposing it; that the more eminent and widely spread and well deserved his reputation, the more careful he should be not to lend his influence against the conviction of any one whom the public may more or less unanimously pronounce to be guilty. The proposition is so opposed to any just view of a lawyer's duty, if carried into practice, would so obstruct a due and impartial administration of justice, would so obviously convert a court of law, where every man is presumed to be innocent until he is *proved* to be guilty, into a mere field for the enforcement of Lynch law under the forms of justice, that to be condemned it need only to be stated.

It is entirely immaterial whether Gov. Crittenden volunteered or was paid for his services, except that his voluntary defence indicated the warmth and sincerity of his friendship for a man whom he had known from the time they both were boys. If a lawyer whose duty it is to take care not that his client shall be acquitted at all hazards, but that if convicted, it be in accordance with the law and evidence of the case, shall not be permitted to defend a prisoner because upon *ex parte* statements popular clamor is excited against him, we return to the barbarous practice of an unenlightened age, springing from the same ferocious spirit, when every man was deemed guilty if he chanced to be suspected, where accusation was conviction, confession forced by torture, no witnesses suffered to testify, and no counsel allowed to speak in exculpation. It is passing shameful that a lawyer like Gov. Crittenden, against whom hitherto no word of reproach has been uttered, should be pursued, insulted and persecuted for no other reason than because in the great distress and heavy affliction of an intimate personal friend, he volunteered those services, which that friend had abundant means, and doubtless ample inclination, to pay for, if required. Shame upon any one who will say that money should have purchased what friendship had no right gratuitously to bestow.

The defence rested upon the position that Butler commenced the affray by striking the first blow, and that Matthews Ward, being a weak and physically feeble person,

and either being, or having good reason to believe himself in great bodily peril, was justified in using the pistol as a necessary measure of self-defence. It was argued that Ward's errand to the school-house was altogether legal, proper, and highly to be commended. He was informed, and believed, that his brother William had been severely and unjustly whipped, and called a liar, in the presence of the whole school. As a specimen of the manner in which the severity and disgrace of the punishment were presented to the jury, we insert the following extract from Mr. Marshall's speech, the "*fun of which*," as the counsel for the Government say, is in the law he has laid down in other parts of it.

"The strap, gentlemen, you are probably aware, is an instrument of refined modern torture, ordinarily used in whipping slaves. By the old system — the cowhide — a severe punishment, cut and lacerated them so badly as to almost spoil their sale when sent to the lower markets. But this strap, I am told, is a vast improvement in the art of whipping negroes; and it is said that one of them may be punished by it within one inch of his life, and yet he will come out with no visible injury, and his skin will be as smooth and polished as a peeled onion! This is its effect on negroes; whether the same be true when it is applied to the backs of schoolboys, I know not.

Well, the strap was sent for, and another boy was called up, who was asked why he had been eating chestnuts. He replied, 'Willie Ward gave them to me.' On being asked if this was true, Willie answered, that he gave him the chestnuts, but that it was before the recitation order had been given. The other boy said that it was after the order, but Willie steadily maintained that it was not. The other boy was accredited — he was disbelieved — the breaking of a rule of the school, by the former, by eating at forbidden hours, was forgiven; but this boy, fifteen years old, was publicly whipped — not for disregarding the regulations, but on a simple question of veracity, where the probabilities were at least in his favor — flogged as a common liar, in the presence of the whole school, with an instrument with which slaves are whipped! This was the account of the matter given by the accused to his mother."

The whole of this rhodomontade has no better foundation than this single passage in Mrs. Ward's testimony, "Professor Butler sent into the other room for his strap!"

It was farther argued by all the counsel that, believing William's story to be true, the prisoner was not only authorized, but required to seek Butler, and that Butler ought to have rendered an explanation of, and an apology for, the outrage. In supporting this position one of the counsel indulged in the following strain of unanswerable argument.

"The gentlemen may talk of universal principles, but there is no principle in nature more universal, than the law that kindred blood will stand by kindred blood. Go into the forest, and even the lowest vermin in the

range of animate creation, will resent an insult offered to their kindred blood. The hen, the pheasant, and the gentle partridge, the wildest bird in our woods, will flutter around their offspring to protect them from impending danger, and punish any insult that may be given them. And I have somewhere read of an incident, in which the sluggish and stupid pelican, when she saw her nest robbed, and her young taken rudely away before her eyes, while she had no power to protect them, with her beak tore out her own bleeding heart, in agony and despair.

I ask you if there can be a higher sentiment than that, which, when the father is insulted, or the child is outraged, prompts the son or brother to resent it? Our feelings and our passions come from on high, and no human law can repeal the laws of the ALMIGHTY. As well might you command the waves of the ocean to cease their turmoil — the broad leaves to fall no more at the approach of the frost — the buds not to swell, and the flowers not to unfold in the warm breath of Spring, as to attempt, by any verdict that you can render, to blot out from the human heart this kindred sympathy and kindred love. As long as man lives, the principle will exist, and it is right that it should be so. Would you have us dead, and inanimate to every generous pulsation of the human heart — callous as marble — Ishmaelites on earth, with our hands against our brother, and every man's hand against us? It cannot be; blood will cleave to blood."

It was then contended that as Ward had demanded the explanation and apology in a gentlemanly and proper manner, and both had been refused, he had the right, upon the principle of retaliation, to take satisfaction, and still farther insult the deceased in the presence of his scholars, by using the language of a blackguard.

Mr. Marshall makes upon this point the following rhetorical display.

"We know that an explanation was refused. In mild and not offensive terms, Mr. Ward made a fair and reasonable requisition. Mr. Butler met him in no such spirit; he put on the haughty to him — refused to answer — would not be interrogated. He was asked if he had fully made up his mind; he had. 'Then, sir, as you will give no explanation, as you will not suffer the case to be fairly investigated, and the facts made known, you must hear my opinion of you You have disregarded the courtesy of a gentleman; you have disgraced my brother; insulted my family, and refused all reparation; sir, you are a scoundrel and a coward.' Every thing had been refused — all satisfaction denied, and the prisoner, after having made a just demand, must pursue the course he did, or meanly skulk from the presence of this puissant pedagogue. And the words he used were no harsher than those which had been applied to his brother."

Governor Helm adopts the same idea, but with less dramatic effect. He says; "The only satisfaction left the prisoner, after all explanation and justice were refused, was that of hurling back precisely the same insult that had been offered to his brother, and thus making the one offset the other."

Governor Crittenden even endorses the argument by saying, "He felt his brother had been abused, insulted and

outraged, and when all other redress was superciliously denied, he *took the only satisfaction that was left him* by applying these terms to Butler."

The position is then seriously urged, that, after this provocation, Butler should have remained passive. To resent the insult by a blow was an illegal act, and his death the necessary consequence of his own wrong. Probably the counsel thought that he should have contented himself by retorting the billingsgate he received, and thus placing himself on a level with his cowardly assailant, armed with a pair of pistols and backed by a bowie-knife. But instead of pursuing this legal and peaceable course, Mr. Crittenden says "he made the first assault," and "promptly and fiercely pursued it until he had placed the prisoner in a position where he had good reason to apprehend the most serious bodily harm, in a position of extreme suffering and extreme danger;" that thereupon Ward had the legal right, in self-defence, to extricate himself by the pistol. Mr. Marshall expounds the law of self-defence in the following burst of characteristic eloquence.

"As you have heard, we are told here that this right is not derived from the law of England, but from the law of sensation — the law of nature. It is the law of all animate nature, and, upon a more enlarged and liberal view, of all nature, both animate and inanimate. In this strange and wonderful system of antagonisms, it is an all-pervading principle. Every thing in the wide bounds of nature seems to have its enemy, and is provided with the necessary and appropriate means of defence.

In animate nature this is always true. Every animal, from the noblest to the meanest, has its natural enemy, and each is provided with its own proper and peculiar weapon to fight against it. Even the serpent, the lowest in the whole range of animal life — the first tempter of our race, all cursed and blasted and blighted as he is, his head bruised and ground in the dust by the falling heel, between whom and man God has planted a bitter and undying enmity — even he, has the power of self-defence; the Almighty has not deprived him of that, but has left him his venom and his fang. And the viper, the lowly reptile you tread beneath your feet, is not unprotected; but he turns upon you, and exercises that right of self-defence with which nature has provided him.

But what does this right mean, and how far does it extend? It confers upon me the privilege of beating off any injury or infringement upon those inherent rights with which God and nature have provided me. It gives me the right to exercise any means, to use any amount of force, that may be necessary to repel such attacks. No man has a right to take my life; I may defend it and preserve it at any cost. But this is not all; a man's rights are not confined merely to the preservation of his life. He has others, many others, guaranteed by nature, that are nearer and dearer, and which it is his privilege and his duty to protect. Without these, life itself could have no charms; and had I no other right than the simple one of existence, I would raise my own wild hand and throw back my life, in the face of Heaven, as a gift unworthy of possession."

The pertinence of which illustration may be better appreciated by remembering that the use of the pistol was not justified because Ward *thought*, or had any reason to believe, his *life* in danger; but only that he was in a situation of extreme suffering, or had reason to think so.

These doctrines are sufficiently extraordinary, and Kentucky, we suspect, is the only civilized community on earth where they could be maintained without destroying the reputation of the person who advanced them. According to the counsel for the defence, every teacher is answerable to every brother of every boy, whom he is called upon in the exercise of his discretion to punish. He is bound to explain, before his whole school, the causes which induced his conduct. If the explanation is not satisfactory to such self-constituted judge, he must apologize. If restrained from thus abasing himself in any place by a sense of self-respect, or before his pupils by the necessity of maintaining his authority, though willing to explain the case in private, he must tamely submit to the grossest imputations which "mild and amiable and gentlemanly" young men can apply to him. If, moved by the sudden impulse of a generous indignation, he raise his hand to turn the ruffian from his presence, or if, in the infirmity of human nature, he retort the insult by a blow, he may, although "a just man," and a notoriously mild, amiable, and peaceable man, and a "great favorite" with the *father* of the punished boy, be nevertheless shot to death by the bully who assails him. Such is Kentucky law, administered in what Mr. Crittenden with great felicity denominates a "*house of* KENTUCKY JUSTICE!"

Although in our estimation the act of the prisoner was an impudent and illegal interference with the duty of his father, and the demand for explanation one which Butler was not only justified in refusing, but compelled to refuse, under any circumstances, and which was especially impudent and insulting from the place and presence in which it was made, yet let the position assumed in the defence be conceded, that it was a proper and lawful interference, dictated by those irrepealable laws of kindred placed by the Almighty in every human breast.

The next position is, that when the prisoner entered the door "he was free from all malice and all criminality; that he had no criminal intention of any kind, because he had formed no deliberate intention to kill Mr. Butler." Then

the altercation took place. Butler struck the first blow, and Ward was compelled to shoot him in self-defence.

The fact that Butler struck first is not proved by the evidence, even as detailed in this *ex parte* report. Even if proved, it would fall far short of a justification of the prisoner's deed.

Thirteen of the pupils, of whom the youngest was fourteen, and the eldest twenty years of age, were examined for the prosecution, not one of whom saw Butler strike Ward; and yet the affray took place in their very midst, while they were standing or sitting in nearly a circle around him, some being as near as four feet from the parties, and others at no greater distance from them than twenty feet. One physician testified to Butler's dying declaration as follows. He "said Ward had come to see him, they had a conversation in which Ward called him a d—d liar, and struck him; that he then struck back, and was shot, but did not see who fired the pistol." Another physician gave as Butler's dying declaration — "He said Ward called him a d—d liar or scoundrel, and raised his hand; that he (Butler) then struck Ward; they clenched, and he was immediately shot." The difference between the two physicians being merely, as the counsel for the government remark, that one understood that Ward raised his hand *in* attack, the other that he raised it *and* attacked.

Against this testimony the defence produced a witness named Barlow, who testified as follows.

"Reside in Louisville; am a carpenter by trade. Have been there on and off for seventeen years; am a married man; was born in Kentucky, Harrison county; on the 2d of November, was attending to some business on Gray Street; on my way to and from it, I passed and repassed the Louisville High School; when I was on Chestnut Street, met Mr. Ransom's little boy; noticed that the boys were all out, some without their caps on, and wondered what was the cause; the little lad told me that Matt. Ward had killed Mr. Butler; I asked if he was dead yet, and he replied, No; I then saw the boys taking Prof. Butler to Col. Harney's; followed them there, but did not go in; then returned to the school-house, and while I stood there Dr. Thomson came up; I asked if he was going up to attend Prof. Butler; he replied that he was, and I went with him; we entered and found him lying on a rug in the middle of the floor, in front of the fireplace; the doctor commenced fumbling over him, and I suggested that it would be well to take off his coat; we did so; a young man there, whose name I did not know, assisted in taking off his coat; while we were doing so, I asked him, 'Who done this?' He replied — 'Matt. Ward did it.' I then asked — 'What for, sir?' He said — 'I had been correcting one of the boys for disobeying the regulations of the school, and they both came to the school-house; Matt. said he had come to seek for an explanation, and in the conversation he gave me the d — d

lie; I struck him for it, and in the fuss he threw his right hand round against my breast and fired; the pistol stuck in my coat, and I afterwards knocked it out.'"

The testimony of this witness is essentially incredible. Undoubtedly the report before us places it in the most favorable light, but a very cursory examination of it serves to show that, laying no stress upon the suspicious circumstances under which other evidence in the case proves it to have been given, it is inherently unworthy of credit. The witness was completely contradicted by the prosecution in many material circumstances, and probably no witness who ever testified was more thoroughly impeached than this Mr. Barlow. It is impossible that the jury, with all their prepossessions in the prisoner's favor, could have allowed him the slightest influence.

Farther to prove that Butler struck the first blow, the defence produced Robert J. Ward, Jr., who was present during the difficulty, who had accompanied his brother expressly to keep off Sturgus, should there be any fight, who was armed with a bowie-knife, which he had habitually worn for six months, who, during the affray was proved to have "flourished it about," and who was jointly indicted in the first count as a principal, and in the second count of the indictment, as aiding and abetting the murder.

This bold, and as it proved, successful attempt to introduce an incompetent witness, the prosecution opposed. We are not favored with the arguments of the counsel on either side of the question, nor with the opinion of the court. All that is stated upon the matter is in the following paragraphs.

"The Defence now stated that they desired to introduce as a witness, Robert J. Ward, Jr.

The Prosecution objected, on the grounds that the proposed witness was jointly indicted as a principal with the defendant in this case.

Mr. Gibson cited various authorities in defence of the position.

Mr. Crittenden replied at length, contending that the testimony would be competent, and reading from a large number of authorities, on which he based his argument.

Mr. Gibson replied, after which

The court ruled the testimony admissible, having first reviewed the arguments offered on both sides. It seemed necessary to a fair investigation of this case that the witness should be admitted, his credibility being a matter of fact for the jury to decide."

Perhaps the counsel understood the court as well as they understood the inclination of the jury, and hence a

ruling disgraceful even to a court of "*Kentucky justice.*" We do not propose to argue the incompetency of this witness. No lawyer can have a doubt upon the point. The responsibility of such gross departure from the plainest principles of law, rests between Mr. Crittenden who urged, and the judge who allowed it. This perversion of the law, and the unjustifiable use made of the testimony, thus illegally introduced, in our opinion partly accounts for, and in some degree justifies, the general indignation felt and expressed against the counsel for the prisoner.

This witness testifies for the defence under the alternative of declaring the truth to his own peril, or exonerating his brother and himself by coloring, suppressing, or falsifying the facts. We know nothing about this "precocious" young man, except from the report of his brother's trial, nor would we willingly do him the slightest injustice, though, according to his own statement, he had "carried arms since he was fourteen years of age; being always associated with men older than himself; did so, fearing that he might get into a difficulty sometimes, and need them to defend himself;" thus proving he was a young gentleman of doubtful associations. We nevertheless believe his statement, that he was not aware that his brother carried pistols to the interview with Butler. Perhaps he is entirely capable of condemning himself, should the truth require it. We regard only his attitude before the jury, and the degree of credibility to which his statements were entitled. In this view we cannot conceive that he was worthy of the slightest credence, where he was not amply confirmed. He testified under the strongest temptation which can assail the integrity of a witness. He was not only to prevent the conviction of his brother, but to save himself the disgrace of a public trial, which in any other State than one imbued with the peculiarities of "*Kentucky justice,*" would have resulted in his own conviction.

Yet it was by the testimony of this witness, thus open to suspicion, and as we think not only uncorroborated, but in many material points flatly contradicted by every witness of the transaction, that Mr. Crittenden argued and earnestly insisted it to be proved that the first blow was struck by Butler. He says:

"Let us look at the testimony of Robert Ward; and after what has been shown you, I think it is not asking or saying too much to claim that

this is the only testimony which has brought order out of disorder — given the only connected and reasonable account of the whole affair, — a consistent history of the events that transpired — natural in their course, and leading directly to the results that actually occurred."

Perhaps it is fair enough to urge, especially in a desperate case, that this witness, testifying under so strong a bias, is nevertheless the only one worthy of belief. The great reputation of counsel might possibly induce any jury at least respectfully to listen to so bold an attempt to impose on their credulity, and his great abilities invest the argument in support of it with some plausibility. But the testimony of the scholars must still be disposed of; it would be a little too audacious, for even the most unscrupulous of the prisoner's counsel, to denounce them all as perjured, especially as they were the sons of some of the most respectable citizens of Louisville. Therefore two theories are advanced to destroy the force of their evidence. Mr. Crittenden first says:

"It must be remembered they are but a set of boys, and that they are testifying in regard to a circumstance in which their teacher was killed. They must have been under the influence of excitement and fright. The time which the accused spent in the school-room was at most, not more than five or ten minutes. When he entered, they were engaged in their studies, and it was contrary to an explicit regulation of the school, to turn around and look up, when strangers came in. And when, so unexpectedly, like a flame from the earth, this fearful occurrence broke out in the stillness of that school-room, what must have been the panic of these boys? You can imagine as well as I. It would have startled men — the calmest and firmest in this jury box, or this court-room. Benedict, I think, gives a very just idea of the condition of all of them. He says: 'I was so much frightened, that I couldn't think of any thing, or see any thing hardly.' And whatever the gentlemen may contend, I believe this was the state of all the boys in the room. They may have seen Butler and Ward during the conversation in the early part of the interview; but this was all they saw clearly. One fact alone is sufficient to diminish the weight of their testimony. Not one of them heard all the conversation perfectly. Though one or two are confident that they did, they are contradicted by the others, who heard words and sentences which never reached their ears. No two of them give the same account of it; but on the contrary, there is much inconsistency and contradiction. It is evident that no one of them saw all the acts, or heard all the conversation that passed; and this, in addition to the general panic that agitated their minds, and confused their recollections, renders it impossible for them to give a fair and perfect history of the occurrence.

'Ah,' say the gentlemen, 'but the panic was all after the firing of the pistol. Before this, up to the very moment when it took place, they can remember distinctly all that occurred.' Is this rational? Is it according to the philosophy of the human mind? Was not the whole mind agitated and stirred, so that the things both immediately preceding and immediately succeeding, were thrown into one mass of chaotic confusion? There is no other reasonable inference from the facts. Here, then, a parcel

of school-boys are brought up under these circumstances, to testify in a case of life and death — to testify in regard to a conversation partly heard and acts partly seen."

Even this extraordinary theory it may be unobjectionable to urge upon a jury whom it would be likely to affect, although one of the "mere school-boys" (Campbell) was twenty years of age, and was cross-examined with such severity as showed how forcibly his testimony bore against the prisoner. It was fair enough thus to comment upon testimony in some respects undeniably conflicting. But we cannot conceive that any counsel of respectability was justified in advancing the second theory, by which it was attempted to account for the close coherence of their evidence upon another material and striking fact.

Almost every boy who testified, distinctly asserted, that when Ward entered the school-room he had *his right hand in his pocket*, and gesticulated with the fingers of his left. They corroborate each other in this important fact with remarkable unanimity. The only other witness of the transaction, Robert Ward, as distinctly asserted that the prisoner's hands were by his side when he entered the room. "We all bowed to Butler when we entered; my brother's hands were then by his side; noticed that he held his hat in his left hand, and gesticulated with his right, after we entered."

To get rid of the testimony of the boys as to the position of the right hand, which had so strong a tendency to the establishment of express malice, the counsel argued with *no proof*, with not even a *shadow of evidence*, that Sturgus, moved by demoniac hatred towards the whole Ward family, first advised Butler to refuse the explanation, and then instilled into the minds of his pupils, by artful insinuation and cunningly contrived observations, the belief that the fact they testified to was true, he himself all the while knowing it to be false.

Mr. Wolfe says:

"There is a man by the name of Sturgus, who, though a superintendent in the school, though he was present, on the ground at the time, is not here. His testimony, it would seem, must have had some pertinence and some importance; but though he was subpœnaed to be present, he has not dared to darken these doors. I contend that he has infused ideas into the minds of these boys, during his intercourse with them, that have given an impression calculated to confuse and mislead their recollection. I contend such misrepresentations have been so often made to them, as to render it impossible, however good their intentions and unimpeachable their integrity, for them to appear before you and give a correct,

faithful history of the occurrence. And this man Sturgus — he who gives so exalted an idea of his courage by stating that when he saw his friend killed he made his way out of the nearest window — who, when he reached Dr. Caspari's office, instead of asking them to send for a physician, might far more appropriately have said,

'I am the rider of the wind,
The stirrer of the storm,
The hurricane I left behind,
Is yet with lightning warm;'

for if he had not kept in advance of the lightning on his flight, it was only because nature neglected to provide him with the ability to do so — this man, I must believe, has instilled into the minds of the school-boys ideas not consonant to their calm judgment, and their unaided recollection."

Mr. Crittenden repeats this slander.

"These boys, from eleven to eighteen years of age, since the occurrence of the principal fact we are investigating, have been the scholars, and under the tuition and training of Mr. Sturgus. With all their natural sympathies on the side of their teacher — with all these other circumstances tending to give their minds a bias, they have been from that day to this under the authority and instruction of Sturgus, the enemy of Mr. Ward — the pursuer of this prisoner. You, who understand the affairs of men, will see the impossibility of a fair and faithful narration of the event from them, under such circumstances. You well understand how this man — they not knowing it — by a word properly thrown in, or a statement repeated until they were familiar with it and received it without question, may have exercised great influence and control over the feelings and recollection of these boys. He is their teacher and guardian — they are under his charge, and though he was sworn here as a witness for the Commonwealth, he was not introduced upon the stand. Put all these facts together — and it is your business where the facts are not all known, but a few of potent character are established, to infer the others — weigh them carefully in your own minds; and then judge for yourselves if the probabilities in regard to the character of the testimony of these boys are not all in favor of the assumption I have made."

And again.

"Sturgus, as you have heard, had administered a whipping to the boy on a former occasion, the facts of which we desired to introduce here, but we were not allowed to do so. Is it not probable that, instigated by his enmity towards the Wards, when he heard of this punishment, he advised Butler to refuse all explanation and investigation? The circumstances of the case — the position of Butler and Ward — their friendly relations — the just and reasonable demand that was made — all show the refusal to have been inconsistent with his character and his heart. Is it not a rational inference, then, that he may have been prompted by the sinister, subterranean motives of another man, who desired to minister to his own anger and ill-feeling? I think it was not like Butler, when he was asked such a question, by a man he knew so well, and esteemed so highly, to button up his coat and answer haughtily: 'I am not to be interrogated, sir.' But it *was* like Sturgus."

The only foundation for these atrocious attacks upon Sturgus is found in the statements of Mrs. Ward, and of William Ward, which were made just previous to the

prisoner's visit to the school-room. Sturgus was not called either by the prosecution or the defence, but why, is nowhere apparent. All we know of him is in his favor. He was Mr. Butler's assistant, and the admitted high character of Mr. Butler forbids the supposition that he would suffer an improper person to occupy that responsible situation. Yet Robert J. Ward, Jr. must be sustained in statements as intrinsically improbable as any that were made in contradiction of him, which were made under great temptation to suppression and concealment, by the wholly unsupported assumption that Sturgus was such a mean, malignant, vindictive wretch, so vile and bloodthirsty an enemy to the whole Ward family, that for the purpose of cowardly revenge he would infuse falsehoods into the minds of his pupils, and through their testimony revel in the disgrace of the family by producing the conviction of the prisoner.

We will not quarrel with counsel for assuming untenable positions in a desperate case. Self-defence, upon the facts proved in this trial, was as fair a ground to stand upon as insanity or somnambulism were in cases occurring in this locality. If counsel could impose upon the intelligence of a jury by trash of that sort, it was perhaps the prisoner's good luck. The responsibility of an acquittal lies between the court and the jury. Advocates whose skill as criminal lawyers consists in bullying witnesses, insulting opponents and pouring forth extravagant rhodomontade, well suited to the bar-room, the muster-field or the stump, but utterly imappropriate to the solemnity of a court-room, it may not be unreasonable to expect will pervert the law and misstate the facts, and after all, before an honest and intelligent jury, will rather injure than benefit their client's cause. But when a lawyer, whose name alone is a tower of strength, whose reputation is great alike at the bar and in the senate, whose statements are supposed to be stamped with truth, and whose opinions have the weight of authority, when he perverts the law and misstates the facts, and by the force of his great name and brilliant powers urges the acquittal of a felon in the face of evidence, upon assertions unproved and unsupported; not all his past services, nor his future expectations, however great the one or well-founded the other, can avert that just indignation of the public which the perversion of great powers to an unworthy purpose is sure to excite.

The attack upon Sturgus was utterly indefensible upon any code of ethics known beyond a grog-shop. It is disgraceful to the counsel who made it, to the court who permitted it to pass unchecked, to the jury who allowed it to influence their decision. It was unnecessary and uncalled for. A mere slander upon a respectable and an unoffending man. Desperate indeed must have been the cause which required, and reckless the counsel who adopted, such a theory. A course thus repulsive to the natural sense of justice, so derogatory to the dignity of the bar might have been expected from counsel who carry to the court-house the customs of the camp, the muster-field or the stump, who view the law as a trade, and the halls of justice as a bazaar for the exhibition of their wares; who cannot appreciate the responsibilities of counsel as the advocates of truth — but the national character, the extensive reputation, the commanding influence, the undoubted genius of Mr. Crittenden, should have led him to reject with contempt this artifice of a pettifogging attorney.

We think that no candid inquirer will be convinced, either by the evidence or the comments upon it, that the fact is at all proved that Mr. Butler struck the first blow. But let this fact be also conceded. Let charity cover, as a delusion, the extreme credulity, let it excuse, as a pardonable weakness, the tender conscience which induced the jury to receive as proved this questionable fact. They who are not under oath, who are not sitting in solemn practical judgment, who have not in their keeping the life of a prisoner, may require less proof for conviction, and be apt to judge erroneously, and to condemn harshly those who differ from them. They see not the witnesses; however faithful the report, they hear not all the testimony; they cannot, like a jury, decide upon the truth or falsity of evidence by that instinct inherent in every honest heart, which renders a jury, where the witness is confronted with the prisoner, and testifies almost as much by his look, his manner and his character, as by his detail of the facts, so valuable in determining the truth. Let therefore the fact be admitted, that the unhappy Butler did in truth strike the first blow, how will the defence stand upon that admission?

It is apparent from the evidence, from its general tendency and character, that when Matt. Ward, on the evening of November 1st, determined to visit Mr. Butler's

school-room, he anticipated *some* difficulty, some personal collision, as highly probable, if not altogether certain, to arise from the interview. Such was his mother's apprehension *before* he started, and it was her importunity which induced him to take his brother Robert. Such was William's belief, and it was his suggestion which induced him to make the pregnant concession, that if *both Butler and Sturgus* attacked him, Robert might interfere. If *one only* attacked him, Robert was to stand off. This "*wan, weak, rheumatic* invalid," considered himself as a match for either one of these powerful opponents, by reason of his concealed weapons. He doubted his ability to murder both.

It was in expectation, not perhaps of the demonstrative certainty, but of the exceeding probability of a collision, that one hour before his visit he purchased this pair of loaded pistols.

This point is virtually conceded by Gov. Helm, who says:

"He had not been insulted; he merely wished to set his little brother right. You will remember that, before he left the house, his mother insisted on Robert going with him, reminding him, as a reason, of the enmity of Sturgus. He was aware of that enmity before; and it may be that he had thought of it, and reasoned with himself thus: 'I am going to perform a sacred social duty, which I owe my brother; he has been whipped, and denounced as a liar; and, in the presence of the school — in the presence of those very witnesses who saw his disgrace — I am going to have the matter investigated and explained, and to learn whether he was really wronged. But I am weak, feeble, utterly unable to defend myself in case of any difficulty. I know there is a man there who is my enemy; the sympathies of his pupils must be with him, also, and as, *per* possibility, in the performance of this duty some difficulty may ensue with *him*, I will take this little thing along to frighten the boys and keep off Sturgus.'"

And by Mr. Crittenden, who says,

"But he had been told, and he knew before, that Sturgus was his enemy. He knew that by some remote possibility the visit might lead to a collision and combat with him. He was very weak — utterly unable to resist any attack that might be made upon him; and therefore it was right for him to arm himself."

Some difficulty, a personal collision, *either* with Butler or Sturgus, was anticipated by Matt. Ward as possible, and he armed himself accordingly. With which of these two then did he expect it possible that the collision might occur? He went, say the defence, upon a lawful errand, to ask in a gentlemanly way an explanation and apology, which he had a right to require, of a person whom he ad-

mitted beforehand to be a just man and a gentleman, and who was extensively known to be mild and amiable, but at the same time high-spirited and courageous. The assertion that he expected, as a possible contingency, an attack from Sturgus, is one of the many extraordinary assumptions of the defence that should not have imposed for a moment upon any intelligent jury. If Matt. Ward went upon this peaceable errand to Mr. Butler, with no ulterior purpose, upon what ground could he have had the remotest belief of an attack from Sturgus? Admitting that Sturgus *was* his enemy, of which there is not the shadow, we will not say of proof, but of evidence, in any part of the case, it is essentially incredible that he could have believed, even as remotely possible, an assistant teacher, employed by a person of Mr. Butler's character to teach some forty boys, belonging to the first families in Louisville, was so vindictive an enemy, had such ungovernable temper, and was moreover so deficient in common understanding, as without provocation to assail a visitor to *his principal*, and to assail him so violently as to render fire-arms necessary for his protection — and that his mere presence in the school-room, or the mild and gentlemanly conversation which he purposed to have with Butler, would of themselves draw upon him an attack from Sturgus, with whom he did not intend to exchange a word. This, with incautious inconsistency, is admitted by Mr. Crittenden, who says, —

"On the way, Matt. tells him — it was not all detailed here, but this was evidently the burden of the conversation: 'I am going to seek explanation and apology for an injury done to brother Willie. I did not want you with me; you are young and hasty; you do not know the circumstances of the case, and you might act indiscreetly. I apprehend no difficulty — Butler is a gentleman, and will do what is right; and I desire you not to have a word to say.' It was as much as to say, 'I would you were at home, Robert, but now you are here do not interfere by word or deed.' But little Willie, who has heard this injunction, says: 'Ah, brother, but Mr. Sturgus is there!' — not Butler, but Sturgus — 'and you know he has a big stick!' Matt. replies: 'Why, I shall have nothing to do with Sturgus — my application is to Butler.' Then he turns to Robert, and adds: 'If, however, Sturgus and Butler both attack me, you may interfere.' He conjectured the possibility of this only to soothe the feelings of the little boy. He had already made Robert passive; but listening to the suggestion, must excite his anxious and brotherly apprehension; therefore he said: 'If such a thing does occur, which I do not expect, you *may* keep off Sturgus.'"

There was therefore a possible contingency which he foresaw and provided against. This is apparent from the

testimony, and is admitted by his counsel. Let any candid reader of the evidence and the arguments, say whether this contingency related to Sturgus. It had *no* reference to him. Ward went prepared to resist a possible attack from Butler, and the question remains to be answered, Why did he anticipate as possible an attack from Butler?

By every counsel it was strenuously urged that the prisoner's errand was lawful, and his demand for explanation and apology one with which Butler ought to have complied. By every counsel it was urged, that the insult which he offered to Butler when compliance with the demand was refused, was a proper satisfaction, and the only satisfaction left for him to take. The *refusal* of Butler to accede to this demand, was the *contingency* on the happening of which the collision was expected. *Why?* Because Ward must either "*pursue the course he did, or meanly skulk from the presence of this puissant pedagogue!*" This course he made up his mind to take in the contingency of the refusal. If Butler failed to apologize, he predetermined to insult him, as the only *gentlemanly* satisfaction left; and as the counsel for the prosecution say "the use of such language in our good old commonwealth operates like a trumpet-call to battle, every man who utters it knows he will be struck." Ward knew well enough what would follow his insult — he is possessed of much less intelligence than was claimed for him on the trial — he had much less respect for Butler than his uniform assertions indicated — he had little belief in Kentucky chivalry — if he was not certain that the gross, deliberate, aggravated insult which he offered to Butler, would produce from him a demonstration of some kind. It was less the evidence, than the instinct of a Kentucky jury, which settled the fact. Campbell knew it; he felt as if he should fight. Sturgus is ridiculed by every counsel in defence, because he *did not* fight, but, scared by a brace of armed bullies, jumped out of the window instead of assisting his employer. Butler is commended as "a man of courage, who would not receive such language without giving a blow in return." Had he not resented the insult on the spot, Kentucky chivalry would have forced him from the State. Ward knew that he would be struck when he uttered the insult. He predetermined to utter it if the apology were not given, and he foresaw and provided against the contingency of its denial. Therefore the provocation to the

quarrel was given by the prisoner. It was of his own seeking, and he intended the result which naturally followed the means he voluntarily used.

Mr. Allen, in his closing argument, states the correct law upon the point: — "A man must be without fault before he may kill an assailant: there can be no extenuation of his offence, if the provocation were of his own seeking." Nor can we perceive any substantial distinction in principle between this case and those usually cited from Russell on Crimes, where A. and B. having fallen out, A. said he would not strike, but would give B. a pot of ale to strike him, upon which B. did strike, and A. killed him, it was held to be murder. So where A. and B. were at some difference, A. bade B. take a pin out of his (A.'s) sleeve, intending to take the occasion to strike or wound B.: B. accordingly took out the pin, and A. struck him and killed him, it was held to be murder.

Upon this point the defence contended that the killing was without malice, and in support of this proposition advanced some curious principles of law, probably to be found in no code except in that "glorious unwritten Kentucky law, which has never been contaminated by coming in contact with printer's ink."

It was first contended that there was no express malice. No accurate definition of this legal phrase was given by the counsel, who seemed purposely to confound together malice and hatred, contending that because Ward had not predetermined the death of Butler at all hazards, and did not visit the school-house "with a deliberate intention to shed the blood of a man whom he *respected and loved*," there was no legal malice proved.

But it was on the question of implied malice that the law received those new illustrations which must forever render the trial memorable in the history of jurisprudence. The hard fact in the case was the purchase of loaded pocket pistols, just one hour before their fatal use. That point required delicate and decisive handling, and the counsel seem to have exhausted upon it all their ingenuity and skill.

To repel the implication of malice which almost irresistably arises from the fact of the purchase and its accompanying circumstances, it was proposed to prove that it was the general custom in Louisville to carry arms. Such evidence was objected to, but was admitted.

"*Mr. Wolfe.* Will you tell the jury whether it is the ordinary custom in Louisville to carry arms?

Mr. Carpenter objected to the question.

Gov. Helm remarked that they desired to prove the custom with a view to rebut and repel any presumption of malice on the part of the defendant.

Mr. Carpenter considered the issue an outside one, and thought that if it could be shown that every man in Louisville was in the habit of bearing arms, it could be no mitigation of the circumstances in this case as already proved. A custom could not justify a breach of law.

The Court remarked that the Commonwealth had shown defendant to have procured pistols on that day; the question now at issue was, whether this killing was done in self-defence, in the heat of passion, or maliciously. Any facts tending to show the motives of the accused were legitimate, and the question was therefore permitted."

The answers of the witnesses did not much assist the prisoner. Mr. Prentice, an intimate friend of the family, replies:

"My own impression is, that the proportion of those citizens who bear arms habitually, is small. Nevertheless, I believe almost every young man, if he is expecting an interview which is unpleasant and may result in a collision, especially with a person of superior strength, arms himself. Have known numerous instances in which it has been done — not with a view to commit violence, but to prevent himself from being disgraced."

Major Alexander cannot go much farther. He says:

"Call Louisville my home; as far as my personal knowledge goes, have often known arms borne on the person there; do not know that it is always done, but know it is usually the case when a difficulty is anticipated; have done it myself; as far as I have known of persons wearing arms, it has universally been done for the purposes of defence, not assault."

After this signal failure to establish a custom, it was attempted to prove the prisoner's special habit of purchasing pistols, and having them loaded at the shop! This was a little too bold, and the question was disallowed. Then it was proved that he had been for several days preparing to visit his plantation in Arkansas, and thence it was argued that he purchased them for protection on his journey.

Still the facts pressed heavily upon him. He bought the pistols an hour before he used them, had them loaded when he bought them, went almost immediately to the school-room, entered into the conflict *secretly* armed, provoking upon himself an attack from a *man of courage*, whom he *loved and respected*, but who in physical powers was far his superior. Upon these facts the law is clear, as stated by Mr. Allen.

"I contend that this act was murder — not manslaughter — because it is the presumption of the law that it was done with malice. (Archbold,

124, 316). That presumption is sustained by the fact that the defendant entered into the conflict armed. (Wharton, 369, 374). The antecedent preparations indicate the existence of malice (Ib. 276): and when this is once established, the malice is presumed to exist, during the whole time occupied by the transaction (Ib. 360, 361). The facts that the pistols were procured; that they were taken to the school-house and used immediately after, are plain indications of a malicious heart. No sudden passion — no heat of blood seems to have existed, which is necessary to reduce the offence to manslaughter (Ib. 368); but all the circumstances show cool and calculating deliberation."

This cogent argument was anticipated by the defence, perhaps the opening counsel for the prosecution may have urged it more powerfully. But how the defence writhed and twisted under the almost conclusive inference of malice arising from the facts, may be seen from the following answers to it.

"The difference between malice express and implied, and the circumstances under which it may be implied, are pointed out in Russell, p. 482. It may be either expressed or implied from certain reasons, but this implication is merely an inference — only a presumption, and if I am able to meet it with facts that combat and destroy that presumption, of course it can have no effect.

With a view to fasten upon your minds the distinctions between murder, manslaughter, and justifiable homicide, I will read you a few cases. (The principal cases cited by Gov. Helm on these points, were from Wharton, pp. 224, 234, 235; and Russell, 513, 514, 515.)

It must be remembered that we have no written law in Kentucky relating to these points, and that the authorities from which I have been reading are English authorities. Many of these old books, being compiled from various sources, collecting here one maxim of law and there another, contain many inconsistencies and contradictions; and moreover, their tenor is much more stringent than the decisions which usually are and always have been made in the United States."

But the clincher is the following:

"They will read you authorities to show that, because a pistol is a deadly weapon, the law will presume malice in this case. Now I will repel that assertion by this fact. *In the store where the prisoner procured it, there was a great variety of instruments, of all kinds. But he chose the least weapon in the whole establishment — one that, in nine cases out of ten, would not produce death. The law that the gentlemen* WILL READ YOU, REFERS TO THE OLD ENGLISH PISTOL, — NOT TO MERE POP-GUNS SUCH AS THIS. The weapon has been produced here, and you can judge for yourselves of its deadliness. The circumstances under which it was used — the contiguity of the parties at the time — remember, were brought on by the deceased himself, and not by the prisoner at the bar; he could not avoid it.

Now, if he intended to produce death, why did he not procure a weapon that was sure to do so? If it were vengeance and death only that he sought, he knew of the event the night previous, and why did he not go, under the cover of darkness, at that still hour, call out Professor Butler and take his life, when he might have had an opportunity to make good his escape?

But admitting, for the sake of argument, the proposition of the State, that he procured the pistol to be used on that occasion, even then, I combat

the presumption of malice. I ask you again, is it probable that a man of *honor and a gentleman*, would go with a deliberate intention to shed the blood of a man he respected and loved!"

We apprehend that such stuff as this, was never uttered by respectable counsel as law in any other than "a house of *Kentucky justice.*" It is a little worse than the argument of another Kentucky lawyer, that a prisoner could not be convicted of manslaughter because it was proved he killed a woman.

The final answer to the whole argument rested upon the natural and inherent right of every man to bear arms in *self-defence.* It must therefore be presumed that the prisoner purchased the pistols in the exercise of that general right.

"My object is to show that when a man arms himself with a general purpose, there is no rule of law by which it can be converted into a special one; that if he does obtain weapons, and uses them lawfully afterwards, the procuring of them was no crime. If Mr. Ward procured pistols before the conflict, and during the conflict unfortunately slew Mr. Butler — I say unfortunately, not that I deem the act a guilty one, but because the loss of human life, under any circumstances, must cause a pang of regret to the hearts that are left behind — if during the catastrophe, he acted only according to law, the fact of his procuring the pistols cannot make an act unlawful which was otherwise justifiable and proper."

Having thus lawfully purchased those pistols, in the exercise of an inalienable right, he used them in self-defence, and thus was justified, and perhaps even praiseworthy, in killing Mr. Butler.

We have said enough, we think, to demonstrate that self-defence was a mere pretence, the sole hope of a desperate case. But we cannot leave this topic without alluding to the still more extraordinary doctrines set forth by the counsel, and urged and enforced without correction by the court. As an example:

"But they contend that if you have been in fault at all, when you are attacked you must not avail yourself of the right of self-defence, which is guaranteed to every man alike by the laws of nature and of human society. Does this seem reasonable? Suppose a man assails you in your absence, or defames the character of your wife or daughter. You seek him, or inadvertently meet him, and denounce him as a scoundrel and a villain. If he attack you then, have you no right to defend yourself, and resent the insult? Is this law, in Kentucky, and in this Union? I deny it."

This newly discovered principle is the great American doctrine of self-defence, which is thus commended by the same counsel:

"In the case of Granger in Tennessee, this principle was also estab-

lished, and it is one that must appeal to reason and humanity. The cruelty with which the law was administered in former times, shows that the world was in a degraded condition, and that human rights were not properly appreciated. There was a time, when there was no less than one hundred and forty offences punishable with death. In those days, if a man broke down a mound in a graveyard, or disturbed a fish-pond, it must cost him his life. *But now, those rigid rules have been ameliorated by a more genial and civilized code, which goes a bowshot further than these musty old English books, and places a higher value on human life; it is the American doctrine of self-defence.*"

The precedents in support of this great doctrine, probably originated in Kentucky, — at least the citations are nearly all from cases occurring there, — the most remarkable of which are the following:

"The gentlemen have alluded to cases not recorded in the books, and as they have furnished the precedent, I will relate a few. Near Boston, in this State, Stout was tried for the murder of Bullock. During a political campaign, the former, who was a democrat, set up a flag, which Bullock pulled down. Stout would have shot him at the time, but his friends held his arm. Bullock went to a grocery, where he spent the day; and when he was returning home at night, he stopped at the house of Stout and called for whiskey. Stout refused to give him any, and ordered him to leave the house; he would not obey, and Stout took his gun and shot him. He believed from the previous conduct of Bullock, that he had come there to do him bodily harm; he was weak and small, Bullock was a large, strong man, and therefore the homicide was held to be justifiable.

In the Jefferson circuit, a few years ago, Coon was tried for the murder of Shaeffer. The latter had insulted Coon's wife, and Coon went to obtain redress. He told Shaeffer of the insult, whereupon he raised his arm, as Coon thought to strike him, though it afterwards appeared that his hand only contained a small piece of wood. Coon then plunged a file into him, and it immediately proved fatal, yet the jury sustained his conduct.

The case of Owen, charged with the murder of Haire, caused so much excitement in Louisville, a few years ago, that it was necessary to obtain a change of *venue* to secure a fair trial. The parties slept in the same bed; in the morning Haire missed some money, and accused Owen of taking it. Owen asked an explanation; it was refused, and he prepared himself with a pistol before they met again. Haire, I believe, also had a pistol, but Owen shot him, and was acquitted on the ground that he had a right to obtain redress for the injury done his character."

It is not surprising that these cases cannot be found recorded in any book; we trust that for the honor even of "*Kentucky justice*," Mr. Wolfe was mistaken in his recollection of the facts. They must have occurred during the time when books of any kind were scarce, and that State was earning her name of the "dark and bloody ground."

The only reported case cited in support of the *American doctrine of self-defence*, was that of the *State of Tennessee* v. *Granger*, in Yerger's Reports, where "the principle

was established that when in case of conflict, a man believes, and has ground to believe, that he is in danger of great bodily harm, he is justified in killing, whether he really was in such danger or not. His right to defend himself cannot be abridged, and if he has good reason to apprehend great danger, from the facts by which he is surrounded, the homicide is justifiable."

Concerning which Mr. Allen says:

"I have been assured that the decision in the case, in Tennessee, of *The Commonwealth* v. *Granger*, has been overruled in that State, by the Superior Court; and I maintain that you may look through all the law books, without finding a single parallel for it."

Upon the authority of this case it was contended that Ward was placed, by Butler's assault upon him, in such a position, as to have good reason to apprehend, not a mutilation or loss of life, but great bodily suffering, and therefore had a right to shoot him; or, as Mr. Marshall says, "to cut his throat from ear to ear." The facts do not justify the assumption, as Mr. Allen argues in reply.

"There was nothing of the kind; Ward knew that Butler neither intended to take his life, nor to do him great bodily harm. The most violent intentions he could possibly entertain, were to inflict chastisement. There had been no menaces against his life; Robert was close at hand, ready to assist him the moment he was called upon; no weapons had been drawn upon him; and this defendant had no right to anticipate the danger which by law justifies homicide; *he never did anticipate any such danger*. A man must retreat to some obstacle which he cannot pass (Wharton, 386); here, the door was open, and near by, and there was nothing to prevent egress through it. Gentlemen, is this killing in self-defence!"

There can be but one answer to this question, upon any known principles of law as practised out of Kentucky. It was deliberate murder, for which the prisoner should have been convicted.

We have left but little space to speculate upon the causes which produced this disastrous acquittal. Disastrous in every point of view; especially disastrous and disgraceful to the State within whose borders justice was thus mocked, despised and trampled upon. It will go far to confirm the principle which "is fearfully gaining ground among the young men in Kentucky. It is a doctrine that has caused more widows and orphans in the land than any other, — a doctrine which, if you look at a man in a way he does not like, authorizes him to shoot you down; if you speak to a lady acquaintance in a manner he deems too familiar, or if you inadvertently tread upon his toe in the theatre, com-

pels you to make the most abject apology, or to atone for the act with your blood.

It is called the Code of Honor; and the worst feature of this bloody code is, that it constitutes every man the judge and avenger of his own wrongs. It was this principle that actuated the accused — this motive that caused the awful deed. It was this that induced him when, as he thought, a member of his family had been insulted, to go and disgrace the teacher, or take his own redress."

We ascribe the result of the trial to two principal causes independent both of the ability of the counsel for the defence, and of their gross misrepresentation and exaggeration of the facts.

The first cause we notice is, the exceeding injudiciousness of the prosecuting counsel. We have room to make only one extract from the address of apparently the ablest of the four who is called the great "*Ajax Telamon*" of the prosecution, and of whose ability and reputation there seemed to be among the counsel for the defence considerable apprehension. The extract, however, is taken from Mr. Marshall's speech, and may be indebted to his imagination for something of its absurdity:

"Attention has been directed to the past life of the accused, and this travelled young gentleman is graciously informed that he may commence his travels over again. But the permission is coupled with the assurance that wherever he may go — whether he shall climb the rugged Alps and wander in the regions of Polar cold, or roam through the sunny climes of Italy and France, still every opening flower shall remind him of the flowers he has left blighted at home. Should he seek the blue ocean, we are told that each white cap will remind him of the shroud of his victim, and that in the boom of every surge, he shall hear the rattle of the death-shot."

But the following, from another of the prosecuting counsel, is so savagely ferocious, that we can hardly believe that it was not overcolored in the repetition:

"He has told you that were the training of the child of Professor Butler confided to his hands, the first word he would teach him, should be vengeance, and the second, blood. That he would instil into his infant mind no other feeling so deeply as that of revenge, and would train him up to make it the great business of his life to follow, like a bloodhound, the track of the accused, and never to rest until he had found him and shed his blood!"

Shocking, indeed, as Mr. Wolfe says, "alike to every principle of religion and every sentiment of humanity."

An injudicious prosecution is not unfrequently as fortunate for the prisoner as an able defence. If the character

of the arguments for the government is at all indicated by the preceding quotations, and others of a like description which might be made, the jury would naturally become suspicious of the strength of a cause which demanded such eloquence to support it. They would feel compelled to view the prisoner more leniently than his crime required; and would, especially if not very intelligent, experience out of mere pity, a reaction in his favor. The defence took great advantage of this sophomorical declamation, and forcibly urged upon the jury the opposite considerations of kindness and mercy.

The second cause of this acquittal appears to be, the entire doubt in which the jury were left as to the principles of law applicable to the facts. The most contradictory assertions were made by the counsel. Nearly every proposition maintained by the defence was combatted, and we think refuted, by the closing counsel for the government, his being the only argument printed in the pamphlet before us. The jury were told, and rightly so, that reasonable doubts should enure for the benefit of the prisoner. Here four counsel on one side stated such propositions of law as were never before enunciated in a court-room. These were denied by the government, and the true doctrine expounded with no great force of illustration, but still with general distinctness. Left in this position, the jury must rely upon the court to dissipate the fog or acquit the prisoner, because they doubted on the law. We at first supposed it to be a peculiarity of "*Kentucky justice*" that the judge should not interfere, but it is not so. Mr. Allen informs the jury that they are to try the case, "and to form their verdict according to the written law of their country, *expounded by this Court*, and applied to the testimony by their own understanding." And again, "If I have misstated the law on any point, I am sure his Honor will correct it in his charge."

We have recently seen the excellent Chief Justice of our own Supreme Court — excellent as a man, pre-eminent as a lawyer and a judge — occupy more than two hours in charging the jury in a capital cause, where the prisoner was merely a State Prison convict. Such is his habitual practice in every case of the kind, founded as much on his anxious desire for impartial justice, as upon the sense of obligation arising from his station; let the jury understand the law, whatever may be their verdict on

the facts. But in this great Kentucky cause the presiding judge made no charge, worthy of the name, and did nothing to remove the mystification into which the minds of the jury were inextricably thrown.

Of what constituted malice the jury were completely ignorant, the only observation made by the court being:

"Malice, express or implied, is an essential ingredient of this crime; there can be no murder without it. Malice has been defined and explained to you, and numerous cases have been read, where a certain state of facts have been determined by courts of justice, to indicate that acts were malicious or otherwise. These judicial decisions are properly to be regarded as illustrations of the legal idea of malice. In some of them the distinction between the two classes of cases is almost imperceptible; and in understanding those cases properly, you will have to bear in mind the definition of malice, so as to make a just application of the principles of the law to the present case."

But malice was defined and explained to them in two such opposite ways, that they were probably less wise on the point after than before the explanation. These two causes would be sufficient to account for the acquittal, without impeaching the integrity or intelligence of the jury, were it not that the instinct of the human heart, in a case depending upon no nice distinctions — where the important facts were indisputably proved, could not fail to see in this atrocious transaction nothing but a murder.

We have endeavored to consider this trial merely in a professional way. Many points have been omitted, which might be appropriately noticed, — but to criticize it as fully as it is capable of criticism, would much more than double the length of this article. It presents not only strange points of law, but exhibits a tone of thought, a style of professional conduct, and a social idiosyncrasy, fortunately altogether unknown in New England. No Massachusetts man can peruse the report without contrasting "*Kentucky justice*" with that of his own more favored State. He will find in this trial — in the declamations, the expositions, the conduct of the counsel, in the rulings of the court, and the verdict of the jury, and in the doctrines of the "code of honor," which taint the entire proceedings, renewed cause for rejoicing, that his lot is cast in a community where the law is not only ably discussed and wisely expounded, but above all is sure to be impartially administered.

Recent American Decisions.

Supreme Judicial Court of Massachusetts, Middlesex, February, 1854.

COMMONWEALTH *v.* JOHN L. CHAPMAN.

Indictment — Murder — Averment of Assault — Description of Wound — Principal.

In Massachusetts, in an indictment for murder, it is not necessary to aver that the assault was made wilfully, and with malice aforethought.

In an indictment for murder, which alleges that the defendant "did strike and bruise, giving to the said A. B., then and there, with the axe aforesaid, in and upon the said back side of the head of him the said A. B., one mortal wound," it is not necessary to describe either the length, breadth, or depth of such wound.

Evidence that a party is present, aiding and abetting in a murder, will support an indictment charging him with having committed the act with his own hand.

THIS was an indictment for murder, tried at an adjourned term of the Supreme Judicial Court of Massachusetts, held at Cambridge, in the County of Middlesex, commencing February 21st, A. D. 1854.[1] The defendant was indicted for the murder of Reuben Cozzens, at Sherburne, in said county, on the fourteenth day of September, 1853. The indictment, which contained three counts, was as follows: —

"The Jurors for the Commonwealth of Massachusetts, on their oath present, that John L. Chapman, late resident of Sherburne, in the county of Middlesex aforesaid, laborer, on the fourteenth day of September, in the year of our Lord one thousand eight hundred and fifty-three, at Sherburne aforesaid, with force and arms, in and upon one Reuben Cozzens, in the peace of the Commonwealth then and there being, did make an assault, and that the said John L. Chapman, with a certain axe, of the value of fifty cents, which he, the said John L. Chapman, in both his hands then and there had and held, the said Reuben Cozzens, in and upon the back side of the head of him the said Reuben Cozzens, then and there feloniously, wilfully, and of his malice aforethought, did strike and bruise, giving to the said Reuben Cozzens, then and there, with the

[1] Before SHAW, C. J., and METCALF and MERRICK, JJ.

axe aforesaid, in and upon the said back side of the head of him the said Reuben Cozzens, one mortal wound, of which said mortal wound the said Reuben Cozzens then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said John L. Chapman, the said Reuben Cozzens, then and there, in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder; against the peace of said Commonwealth, and the form of the statute in such case made and provided.

"And the jurors aforesaid, upon their oath aforesaid, do further present, that John L. Chapman, late resident of Sherburne, in the county of Middlesex aforesaid, laborer, on the fourteenth day of September, in the year of our Lord one thousand eight hundred and fifty-three, at Sherburne aforesaid, with force and arms, in and upon one Reuben Cozzens, in the peace of the Commonwealth then and there being, did make an assault, and that the said John L. Chapman, with a certain axe, of the value of fifty cents, which he the said John L. Chapman in both his hands then and there had and held, the said Reuben Cozzens, in and upon the back side of the neck of him the said Reuben Cozzens, then and there feloniously, wilfully, and of his malice aforethought, did strike and bruise, giving to the said Reuben Cozzens, then and there, with the axe aforesaid, in and upon the back side of the neck of him the said Reuben Cozzens, one mortal wound, of which said mortal wound the said Reuben Cozzens then and there instantly died. And so the jurors aforesaid do, upon their oath aforesaid, say, that the said John L. Chapman, the said Reuben Cozzens then and there, in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder; against the peace of said Commonwealth, and the form of the statute in such case made and provided.

"And the jurors aforesaid, upon their oath aforesaid, do further present, that John L. Chapman, late resident of Sherburne, in the county of Middlesex aforesaid, laborer, on the fourteenth day of September, in the year of our Lord one thousand eight hundred and fifty-three, at Sherburne aforesaid, with force and arms, in and upon one Reuben Cozzens, in the peace of the Commonwealth then and there being, did make an assault, and that the said John L. Chapman, with a certain axe, of the value of fifty cents, which

he the said John L. Chapman in both his hands then and there had and held, the said Reuben Cozzens in and upon the back side of the head of him the said Reuben Cozzens, then and there feloniously, wilfully, and of his malice aforethought, did strike and bruise, giving to the said Reuben Cozzens, then and there, with the axe aforesaid, in and upon the said back side of the head of him the said Reuben Cozzens, divers mortal wounds, of which said divers mortal wounds the said Reuben Cozzens then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said John L. Chapman, the said Reuben Cozzens then and there, in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder; against the peace of said Commonwealth, and the form of the statute in such case made and provided."

Before the jury were empanelled, the prisoner's counsel moved the court to allow the prisoner, who had, in the absence of his counsel, pleaded not guilty to the indictment, to retract his plea, and to demur, and cited *Regina* v. *Purchase*, Car. & Marshman, 617; Archbold, Crim. Pl. (London ed. 1853,) 113; Purcell, Crim. Pl. and Ev. 132. The court refused to allow the motion, but intimated that they would consider any objections to the indictment upon a motion to quash. A motion to quash the indictment, was then made, and the following reasons assigned.

I. That the indictment is insufficient in this: that it does not set forth that the assault, which is one of the material acts alleged to have been committed by the defendant in the commission of the crime, was done wilfully, or with malice aforethought. 1 East, P. C. 346; 2 Hale, P. C. 184, 187; 2 Deacon, Crim. Law. 930; 1 Stark. Crim. Pl. (London ed. 1828,) 91. [In *Regina* v. *Drury*, 3 Cox, C. C. 544, (1849,) Wightman, J., read the judgment of Coleridge, J., who said, "Mr. Starkie, whose excellent book on Criminal Pleading may now be quoted as direct authority, lays down the same rule," etc.] See the precedents, Archb. Crim. Pl. (Am. ed. 1846,) 482; 2 Stark. Crim. Pl. (London ed. 1828,) 385, and note, (*q*); *Maile* v. *The Commonwealth*, 9 Leigh, 661. And so are the forms from the earliest to the latest cases. See *Regina* v. *Bird*, 1 Temp. & Mew, C. C. 437; 2 Denison, C. C. 94; 5 Cox, C. C. 1; 2 Eng. Law and Eq. Rep. 430; *Comm'th* v. *Webster*, Bemis's Rep. 1 – 3. It has been held, that where

malice aforethought was alleged in the assault, which was coupled with the stroke, to which malice aforethought was not alleged, the first allegation would be insufficient. 1 East, P. C. 346; 4 Coke, 41, *b*; Dyer, 69, *a*. But a contrary doctrine has been held. *Respublica* v. *Honeyman*, 2 Dall. 228; *Comm'th* v. *Gibson*, 2 Virg. Cases, 70. The reason of this is, because, if the first assault is with malice prepense, a subsequent homicide *se defendendo* would not excuse the offence. 2 Hawk. P. C. ch. 29, §§ 17, 18.

II. The indictment is insufficient in this: the mortal stroke is alleged to have been made with a sharp-cutting instrument, to wit, an axe, and a single wound thereby given, of which no description is set out so that the court may see that the wound was an adequate cause of death. 3 Chitty, Crim. Law, (Perkins's ed.) 734; 2 Deacon, Crim. Law, 928; 1 East, P. C. 342; 2 Hale, P. C. 185, 186; *The State* v. *Owen*, 1 Murph. 452, 454, 461, 464; *The State* v. *Moses*, 2 Dev. 452, 463, 464, 466; *The State* v. *Crank*, 2 Bailey, 66; 7 Dane's Abridgment, 275, ch. 218, art. 113, § 2; Davis's Justice, (1st ed.) 319; and so are all the precedents for incised wounds to this day. In the case of an incised wound which caused death, upon the necessity of the description, the authorities were uniform until the leading case of *Rex* v. *Moseley*, 1 Moody, C. C. 97; 1 Lewin, C. C. 189, A. D. 1825, which was twice discussed before all the judges, where it was decided that bruises, lacerations and wounds, all contributing to the death, need not be described, — Littlehale and Holroyd, JJ., dissenting, and holding the indictment invalid. It will be observed, that the law has never required the description of a bruise which did not make a technical wound. The reasons given for the decision in *Rex* v. *Moseley*, were, that it did not seem material to prove the description; and Lawrence, J., had instructed the clerk of assize of the Oxford Circuit to omit a description of the wounds where there were more wounds than one. The next case in order of time, in England, is *Rex* v. *Turner*, 1 Lewin, C. C. 177, A. D. 1830, which was the case of a *bruise*, and although decided on the authority of *Rex* v. *Moseley*, the hurt was described in accordance with the earlier decisions as to the necessity of a description of a bruise. The next case is *Rex* v. *Tomlinson*, 6 Car. & P. 370, A. D. 1834, where Patteson, J., doubted, but Park, B., decided, that the depth of a bruised wound made with a stone need not be de-

scribed, from his memory of *Rex* v. *Moseley*. Because, he said, that as common sense did not require the length, breadth, and depth of the wounds to be stated, it was not necessary that they should be stated, although all the text writers have assigned as a reason, that the wound is described, so that the court may see on the face of the record that such a hurt would be an adequate cause of death. It is to be remarked, that all the precedents in England, in a case of a simple incised wound, still give a description of the wound. These last two cases were decisions at nisi prius.

In America, the earliest reported decisions are the cases of *The State* v. *Owen*, 1 Murph. 452, A. D. 1810, and *The State* v. *Moses*, 2 Dev. 452, A. D. 1830, in North Carolina. In the last of which, even the dissenting judges admitted the law to be as here contended, so far as the description of an incised wound is concerned. It is digested, in Coxe's Digest of Reports of Decisions in the United States Courts, p. 359, referring to North Carolina cases, p. 79, *U. States* v. *Maunier*, that the contrary has been decided. Upon examination no such case can be found. And it is to be observed, that afterwards, decisions in North Carolina, overruling the decision in *Maunier's case*, are found, in which no reference is made or notice taken of any such decision. The next case is *The State* v. *Crank*, 2 Bail. 66, A. D. 1831, which decides only that a bruise need not be described, while the reasoning of the court would seem to admit the doctrine here asserted. The next case is that of *Stone* v. *The State*, 2 Scam. 326, 338, A. D. 1840, where it is only decided, that such description is not bad on error, under the statute provisions of Illinois. The next case in order of time, is *Dias* v. *The State*, 7 Black. 20, A. D. 1843, where the depth of the wound is not described. But the judgment was reversed on other points, and that is not the point decided by the court. These, it is confidently asserted, are all the cases in this country on that point; and it is submitted, that not one is an authority in point against the position of the defendant. In Massachusetts, it was early laid down, that the description of such a wound was a necessary averment. 7 Dane's Abridg. *ubi supra*. And see Davis's Precedents of Indictments, p. 175, and note. It was the common law at the time of the Revolution, has been adopted here, and never doubted since.

After elaborate argument by counsel, and consultation by the court, Chief Justice Shaw stated that the court had considered the objections to the indictment, as though they had been taken by demurrer, or motion in arrest of judgment, and that the court were of opinion that the indictment was sufficient, although in the case of a simple incised wound, the authorities would support the position that a description is necessary. And the court distinguished this from an incised wound, because the indictment alleged that the defendant "did strike and bruise" the deceased.

The trial then proceeded, and after the evidence in behalf of the government was all in, the prisoner's counsel submitted to the court the following proposition, and prayed that it might be passed upon before opening the defence. That if the jury were satisfied from the evidence, that Chapman was only present aiding and abetting some other person who committed the act, this indictment, which charged him as the sole principal, would not be supported. *Comm'th* v. *Knapp*, 10 Pick. 477; *Duffey and Hut's case*, 1 Lewin, C. C. 194.

The court decided, that if the defendant was present, aiding and abetting, so as to make him a principal in the second degree, that evidence would support an indictment charging him as sole principal, as having struck the blow with his own hands.

The case then proceeded, and the jury disagreed.

Rufus Choate, Attorney-General, and *Charles R. Train*, District-Attorney, for the Commonwealth; and *B. F. Butler*, and *F. F. Heard*, Esqs., for the prisoner.

Supreme Judicial Court of Massachusetts, Suffolk, ss.
March Term, 1853.

SAMUEL SANFORD *v.* DARIUS HARVEY et al.

Landlord and Tenant — Termination of Tenancy — Notice to quit.

To terminate by notice a tenancy at will, where rent is payable at the expiration of each month, the notice must be given at least a month previously, and must either specify correctly the exact day upon which the month terminates, or must state generally that the tenant will quit the premises and terminate his tenancy in one month from the day when the rent shall next become due and payable, — such day being equally within the knowledge of the landlord and tenant.

Archibald Little, on the 15th of October, 1849, hired, by parol, of the plaintiff, a house for one year, the rent to be payable monthly, on the fifteenth of each month. The defendants, on the 14th November, 1849, guarantied to the plaintiff the payment of the monthly rent during the year. January 2d, 1850, Little vacated the premises, and left the key with the son of the plaintiff at the plaintiff's office. On the same day the plaintiff notified the defendants of the fact, and that he refused to receive the key, that they could have it, and that he should look to them upon their guaranty for the rent. On the 3d January, plaintiff sent the key to Little's residence. On the 5th January, Little served upon the plaintiff the following notice.

"Boston, January 5, 1850.

To Samuel Sanford. Sir — You are hereby notified that I shall determine my estate at will in dwelling-house lately occupied by me, situated in Thatcher Court, in said Boston, one month from the day of the date hereof.

Archibald Little."

A precisely similar notice, dated January 16th, 1850, was served on the plaintiff on the day of its date. On the 15th February, 1850, Little sent the key to plaintiff, but he refused to receive it. The jury found specially, that the plaintiff refused to accept the key. The rent was fully paid to and including February 15th, 1850, and this action was for the rent due on the 15th March and 15th April. The question was, whether the tenancy at will was terminated by either of the notices.

S. C. Maine, for the plaintiff.

Bancroft and *Dickinson*, for the defendant.

The opinion of the court was delivered by

Bigelow, J. — From the facts agreed, and the special verdict in this case, it appears that the defendants were sureties for one Archibald Little, by a written agreement for the rent of a house in Thatcher Court; that said Little occupied said house under a parol lease, commencing October fifteenth, 1849, the rent being at first payable monthly in advance, but subsequently, upon the giving of the said written guaranty by the defendants, payable at the expiration of each month; that said Little vacated said house on the second of January, 1850; that on the fifth day of said January, he gave the plaintiff written notice that he should determine his estate at will in the premises in one month from the day of the date of said notice; and on the

sixteenth day of the same month he gave another similar notice to the plaintiff of his intention to determine his lease in one month from the day of the date of the second notice. The rent was paid in full up to Feb. 15th, 1850, inclusive, and this action is brought to recover of the defendants under said written guaranty the rent for the two months ending on the fifteenth days of March and April, 1850. It is agreed that the tenancy commenced on the fifteenth day of the month, and that the rent became due and payable on that day in each month.

The only question raised upon these facts, is, whether either of said notices was valid and sufficient to terminate the parol lease under which said Little occupied the premises. It has already been decided, upon full consideration, that under Rev. Stat., ch. 60, § 26, a notice to quit when the rent is payable monthly, in order to be effectual for the purpose of terminating a tenancy at will, must expire in a month from the day on which the rent becomes payable, and that a notice to quit which breaks into the month and expires on an intermediate day, is invalid and insufficient. *Prescott* v. *Elms*, 7 Cush. 346. But the defendants contend that the present case is not governed by that decision, because the notice of January 5th, although insufficient to determine the lease on the 5th of February, for the reason that it would not expire on the day when the rent became due, would nevertheless be sufficient to terminate it on the fifteenth day of February, because the plaintiff would thus have received a notice which covered an entire interval of a month between the days of payment. But this position cannot be maintained. It is a well-settled rule of law, applicable to notices to quit, that, in order to be valid, the day on which the tenancy is to be terminated by the notice must be truly stated, and that any mistake in this respect will be fatal. The authorities all concur on this point, and are collected in Arch. N. P. 397. If therefore a person designate in his notice a day for the termination of a tenancy, which is not the day on which the rent is payable, or a day on which the tenancy can be legally made to expire by a notice, the notice is unavailing, and the tenancy may still continue. No one is obliged to regard a notice which fixes a day for the termination of a lease different from that on which a lease can be by law made to terminate. Such a notice, being one that neither party had a right to give, is treated as a

nullity. Upon this ground it has been recently decided, that under Stat. 1847, § 1, by which, in case of non-payment of rent, a written lease may be determined by fourteen days' notice to quit, a notice to quit forthwith is invalid. *Oaks* v. *Munroe*, 8 Cush. 282. It is by no means necessary to name the precise day and date on which a tenancy is to expire in a notice to quit, but it may be designated in general terms, if stated correctly. Therefore a notice to quit at the end of the month or quarter, (as the case may be,) which will expire next subsequent to the day when the rent shall again become due, without specifying the exact day of the month, would be sufficient to terminate a tenancy at will, under our statutes, after the lapse of the requisite time from the giving of the notice. If, for instance, in the present case, the notice to the landlord had been that the tenant would quit the premises and terminate his tenancy in one month from the day when the rent should next become due and payable, that would have been a good notice to terminate the tenancy, because it designated a day with sufficient certainty equally within the knowledge of the tenant and landlord. Notices to quit in this general form are frequently adopted in England. Arch. N. P. 397, 398. But in the present case, both of the notices given by the tenant designate as the day for the termination of the tenancy, one month from the day of the date of the notice. Neither of these fell on the day when the rent was due, but were intermediate days breaking in on the monthly tenancy. They were therefore insufficient, and the tenancy remained undetermined.

Judgment for plaintiff.

Recent English Decisions.

Court of Exchequer. — June, 1854.

Williams *v.* The Great Western Railway Co.

Common Carriers — Corporation — By-Law.

One section of the charter of the defendant corporation provided that every passenger on the railway might take, free of charge, his articles of clothing not exceeding forty pounds in weight and four cubic feet in dimensions, at the risk of the company. The corporation passed a by-law allowing every

first-class passenger to carry 112 pounds of baggage free of charge, but declaring that the company would not be responsible for the same unless booked and paid for accordingly. In an action against the corporation to recover the value of articles of clothing of less weight than forty pounds, and of smaller dimensions than three cubic feet, the defendant pleaded the by-law, and that the articles had not been booked, &c. *Held*, that the by-law was inconsistent with the charter, and therefore void.

The term "articles of clothing" includes all things necessary to the toilet.

The declaration in this case alleged that the plaintiff booked himself and his luggage on the Great Western Railway, to be conveyed by the company from Paddington to Bristol for hire as common carriers, and that they so negligently conducted themselves that his portmanteau, containing, besides the usual articles of clothing, a dressing case, three brushes, one razor, one strop, one set of studs, and one bottle of scent, was lost. To this the defendants pleaded, that they had made a by-law under their acts, allowing every first-class passenger to carry 112lbs. weight of luggage free of charge, but declaring that the company would not be responsible for the same unless booked and paid for accordingly; and that the plaintiff was a first-class passenger, and had not booked or paid for his said portmanteau and its contents. The plaintiff thereupon replied, that as to certain of the contents of the portmanteau they were articles of ordinary clothing, not weighing 40lbs., and of less dimensions than three cubic feet; and as to the other articles above enumerated, he entered a *nolle prosequi*. The defendants then rejoined, that the luggage consisted of other things than articles of clothing, to which the plaintiff demurred.

Mr. *Cowling* now, in support of the demurrer, stated that the real question raised for the opinion of the court, was the legality of the by-law relied on by the defendants' plea. He was prepared to show that the company had no power to make any such by-law, as its terms were inconsistent and at express variance with the 169th section of the company's act (5th and 6th of Wm. IV., ch. 107), which allows every passenger on the railway to take, free of charge, his articles of clothing, not exceeding 40lbs. in weight and four cubic feet in dimensions, and limits the liability of the company, as carriers, to articles of clothing of passengers of such weight and dimensions. The 144th section authorizes the company to make by-laws for the good government of the railway, and for regulating the proceedings and pay of the directors, and for the manage-

ment of the undertaking, and of the officers and servants, which shall be valid and binding on all persons, provided that the same be not repugnant to the laws of the kingdom, or to any directions in the said act. It will be seen, therefore, that while by the 167th section of the company's act, every passenger is entitled to carry clothing to the extent of 40lbs. weight free of charge, for which the company are declared to be liable as common carriers, the by-law in question actually repeals that provision, and enacts that the company shall not be liable for any luggage whatever unless booked and paid for. This by-law was clearly *ultra vires*, and therefore invalid, and it might well be doubted whether the plaintiff was not entitled to recover, not only for his articles of clothing, strictly so called, but also for the excepted articles, for brushes, razors, strop, and a dressing-case, are necessary and usual accompaniments to passengers' luggage.

The Chief Baron. — The term "articles of clothing" ought to include all things necessary to the toilet. A man can't wear a razor or a brush, but he can hardly dress decently without such articles. We are at present of opinion that it was not competent to the company to make this by-law, and we would wish to hear the other side.

Mr. *Willes* rose to support the plea, but could not help feeling that he did not represent the popular side on this occasion. He was about to address a tribunal composed of gentlemen, who often travelled with luggage, and were very unlikely to fill the office of railway directors.

The Chief Baron. — You certainly are on the unpopular side.

Mr. *Willes*. — I quite feel that; but I nevertheless know that my clients will obtain justice if I can satisfy your Lordships, as I hope I shall, that this by-law is a reasonable one, and not in contravention of the general law or of the provisions of the company's act. The learned counsel then proceeded to argue that, as regarded the obligation to "book" luggage, the by-law must clearly be held to be a reasonable one; but it was so also as to the payment, and was one which, under the 144th section, taken with the 189th and 220th sections of the company's act, they had power to make. The 144th section might be admitted to be ambiguous; the words "for the management of the said undertaking" might or might not include the management of the traffic and the passengers; but, taken with the

other sections, the company contend they have power to make this by-law. The 189th section, for instance, gives power to make rules for regulating the travelling upon and the use of the railway and the travellers passing on it, and for preventing the smoking of tobacco and the commission of nuisances thereon. Under this section the company may make orders for the various classes of passengers and the affixing of labels on the luggage, which passengers must submit to, and the non-compliance with which will exempt the company from responsibility in case of loss.

Mr. Baron ALDERSON. — That may be; but this by-law is a repeal of the 144th section of the act, which allows every passenger to carry 40lbs. weight of luggage, free of charge, at the risk of the company. How can the company by a by-law say they won't be liable unless luggage be booked and paid for, consistently with that section?

The CHIEF BARON. — As to the rule requiring luggage to be labelled, that is quite another thing, and such a rule may be a reasonable one. Besides, the company, as any other carriers, might refuse to carry the luggage except on such conditions.

Mr. Baron MARTIN. — A railway company may make any rule for the government of its business, as any of the old carriers might; but they can't make a by-law, saying they won't do that which their own act says they shall do.

Mr. *Willes*. — At all events, they may require the luggage to be booked.

Mr. Baron MARTIN. — That may be.

The CHIEF BARON. — They may say, first-class passengers shall travel in first-class carriages, and the second in second-class carriages, and they may insist on passengers allowing their luggage to be labelled and placed in certain carriages to facilitate delivery; but all those are very different matters from making every passenger book and pay for his luggage, and saying they won't be responsible as carriers unless both be done. Such a by-law is clearly bad.

Mr. *Willes*. — If the Court is of that opinion, it would be idle for me to keep up the argument any further.

The CHIEF BARON. — We are all of opinion that this by-law is clearly bad. It is sufficient to say, that it is in direct contravention of the express provision of the 144th section. There must, therefore, be judgment for the plaintiff.

Mr. *Cowling*, at the conclusion of the case, could not

avoid expressing his surprise that the company should have thought it prudent to raise this question.

Mr. Baron MARTIN. — I quite agree with you. I wonder at it too.

Mr. *Willes.* — My friend might be content with his judgment.

Judgment for the plaintiff accordingly.

Court of Common Pleas. — June, 1854.

BUCKLAND *v.* JOHNSON.

Where goods have been converted, the plaintiff may either recover the value of his goods in an action of trover, or recover the proceeds of their sale in an action for money had and received, at his election; but he cannot elect to have a part of both remedies.

THIS was an action of trover for the conversion of goods, and for money had and received, the price of the goods, tried before Mr. Justice Williams, when a verdict was found for the defendant.

It appeared at the trial that the goods had been sold by the defendant and his son, jointly, and that the value of the goods had been recovered against the son for the conversion; but the goods having produced 50*l.* more than their value, this action was brought to recover that amount. In the present action the defendant pleaded judgment recovered. At the trial, an amendment was made in the pleadings to meet the matter in controversy between the parties. Mr. Serjeant Byles having on a former day obtained a rule *nisi* to set aside the verdict and enter it for the plaintiff, on the grounds that the plea as altered was bad in law, and not proved by the evidence.

Mr. Lush now showed cause against the rule; and Mr. Hawkins and Mr. Finlaison appeared in support of it.

The Court were of opinion that the rule ought to be discharged. The Court thought Mr. Justice Williams right in the amendment, and that the plea as amended was proved. There had been a substantial recovery from the son to bar the action. The plaintiff might either recover the value of his goods in an action of trover, or recover the proceeds of their sale in an action for money had and received, at his election; but he could not elect to have a bit of both remedies.

Rule discharged.

Miscellaneous Intelligence.

RELATION OF THE MILITARY FORCE, WHEN CALLED OUT TO SUPPRESS RIOTS, TO THE CIVIL POWER — JUDGE HOAR'S CHARGE TO THE GRAND JURY. We give below a portion of Judge Hoar's charge to the Grand Jury at the July term of the Municipal Court. It is an authoritative exposition of the law upon a subject which has excited considerable discussion recently in the newspapers.

"Gentlemen, recent occurrences in this city have made it my duty to instruct you upon another subject, of the highest importance to the peace and security of the community, and intimately connected with principles which lie at the very foundation of our frame of government. I refer, as you already anticipate, to the relation of the military power to the civil authority of the Commonwealth. But a few weeks have gone by since the citizens of Boston saw in their midst a large body of soldiers assembled, the volunteer militia of Massachusetts, engaged, as it has been asserted, in preserving the peace of the city, and maintaining the supremacy of the laws — an honorable and responsible duty, whenever it is lawfully assumed, and faithfully discharged.

From what necessity or cause these soldiers were assembled; under what authority they acted; whether their employment and their conduct were in conformity with the constitution and laws of the Commonwealth — and to whom the responsibility of their acts attaches — are questions which have been publicly discussed, and which it is not improbable that you may be obliged to investigate. The law applicable to them I shall endeavor as briefly and plainly as possible to state to you. And, gentlemen, while the chief reason for so doing is on account of the bearing it may have upon your practical duties, the occasion seems to me opportune so far as it may aid in diffusing just sentiments and a distinct understanding upon a subject concerning which precision of ideas is so important, and upon which so many confused notions seem to prevail.

With the holiday soldier — the bright array, the martial music and waving plumes, which most of us regard with complacency, and which afford such delight to the juvenile spectators — we are all familiar; with the soldier as the terrible instrument of the law, the last resort of the civil government for the absolute enforcement of its authority, we are happily unfamiliar. The cases in which it has been necessary to resort to an armed force to sustain the civil government of this commonwealth, have been of rare occurrence; and when such occasions have arisen, the moderation, prudence and sound discretion of those who were entrusted with civil authority, and the firmness, forbearance, and exemplary deportment of the soldiers, have been such as to lead to no discussion as to the legality of their conduct.

It is extremely desirable, for the sake of the militia themselves, that the extent and limitations of their powers should be justly defined and familiarly known. They wish to understand their duty, and to do it. They are neither strangers, nor aliens. Their interests are identical with ours. They are some of our acquaintances, friends, and neighbors, who have undertaken a particular public service. Interested in its more exciting and cheerful aspect, they are also willing to contemplate its more serious fea-

tures. They are liable to be placed in trying situations, and upon a sudden emergency to be required to do acts of the most painful nature. The importance of an accurate apprehension of legal rights and duties, upon such a subject, can hardly be overrated. A duty more serious, a responsibility more fearful, can hardly devolve upon man, than that which belongs to the citizen-soldier when lawfully summoned to aid the civil power in upholding or executing the laws. He should enter upon it in a serious and thoughtful spirit, regarding it only as a sad and terrible necessity.

Consider gentlemen, for a moment, the sacredness with which human life is invested by the law, the solemnity which the lawful destruction of it every where assumes. The life of the vilest wretch among us, who has outraged all the laws of God and man, cannot be taken, in the administration of public justice, and as the penalty of his crimes, but upon proceedings, where every provision that the wit of man can devise, is made against the possibility of haste, or errors, or oppression. He must be indicted by a grand jury; the supreme judicial tribunal of the State must be assembled; he must be found guilty by a jury, substantially of his own selection from a large number of the most discreet and respectable of his fellow-citizens; able counsel are secured for him; witnesses are provided for him at the public expense; he is to be notified beforehand of the names of the witnesses against him; and when his guilt has been fully established, no man has power to harm him until the Supreme Executive shall have determined that there are no grounds for the interposition of its merciful prerogative, and have commanded the sentence of the law to be enforced.

In self-defence, in obeying the instinct of self-preservation, a man must retreat as far as he can, before he may lawfully resort to a deadly weapon and slay his adversary.

But when a military force is employed to suppress a riot, a hundred lives may be sacrificed in a moment, without preparation — it may be almost without warning — the innocent with the guilty. The soldier who fires upon a mob may doom to instant destruction not only the lawless and depraved, but men of generous impulses and honest purposes — the *mistaken* — the *misled* — the *unwary* — those whom accident or curiosity have brought to the spot; perhaps his friend, his neighbor, his relative.

The public service which he is thus called upon to discharge, is a subject for no boasting beforehand, nor exultation afterward. No man of right principles or feelings should regard it lightly. He should go to it as he would go to attend an execution, and return thanking God for all that he had been rightfully permitted to leave undone.

It is sometimes said that our government rests, at last, upon military force. It rests upon no such thing. It finds its chief strength in the respect of an intelligent and virtuous people for the laws which they themselves have made; and its ultimate reliance is upon the power of the people to execute their own will. The military force which a free people allows to exist among them, it regards but as a convenient instrument.

To understand clearly the points involved in this inquiry, it will be well to recur a little to first principles.

The object of a constitution of government, is, in the Preamble to the Constitution of Massachusetts, declared to be,

'*That every man may, at all times, find his security in the laws.*'

To this end, two things were of the first necessity. 1. The maintenance and enforcement of such wholesome laws as should be enacted; and 2. The protection of the liberty of the citizen from the encroachments and abuse of authority of those to whom power should be intrusted. With a view to the first, the constitution provides for the organization and

government of militia; and, in reference to the latter, the Declaration of Rights contains this article:

'The people have a right to keep and bear arms for the common defence; and as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and *the military power shall always be held in an exact subordination to the civil authority, and be governed by it.*'— Dec of Rights, Art. XVII.

By the Constitution, the Governor is made the commander-in-chief of the militia, and intrusted with full power to discipline, instruct, and govern them; and to employ them against the public enemies. He is also authorized to govern them by law martial, when in actual service, in time of war or invasion, and also in time of rebellion, *declared by the Legislature to exist;* with all the powers incident to his office, to be exercised agreeably to the constitution and laws of the land.

His powers in respect to calling out the militia in case of war, insurrection, or invasion, made or threatened, are determined by law. (Rev. Stat. ch 12, § 129 *et seq.*) and are only to be exercised by the Governor in person, or in case of emergency by the commanding officer of a division.

With the nature of these powers and duties we have no immediate concern.

I come then to the question, What are the provisions of law for the suppression of riots and unlawful assemblies, and for executing the laws of the Commonwealth, when forcibly resisted?

These are of a two-fold nature: First, the modes which the common law authorizes, in the absence of positive enactment; and Secondly, the powers expressly conferred by the statutes — each being, of course, limited and controlled by the principles of the Constitution.

I have already given you the definition of a riot or unlawful assembly; and by the common law, any citizen may lawfully endeavor to suppress an existing riot, by resisting those who are engaged in it, and preventing others from joining them.

A sheriff, constable, or other peace officer, may do the same, and may command all other persons present to assist him.

He may also arrest any of the rioters whom he finds committing any breach of the peace, and take them before a justice. Any justice of the peace who shall find persons riotously assembled, may arrest them; and by a verbal command may authorize others to arrest them; and the persons so commanded, may pursue and arrest the offenders, in the absence of the justice, as well as in his presence.

The general principles of the law — that if any person is lawfully employed, and is assaulted, he may use such force as is necessary in self-defence; and that a person charged with the execution of a legal duty may repel, by force, any unlawful and forcible resistance to its performance — apply in these cases.

The power of the mayor and aldermen of cities, and of the selectmen of towns, to secure an adequate civil force by the appointment of police officers, is unlimited. Stat. 1851, chap. 162.

The statute of this Commonwealth, which provides for calling out the militia to aid in the suppression of riots or tumults, and in executing the laws, is the statute of 1840, chap. 92, sects. 27 and 29; and in all essential particulars it is an exact transcript of the 134th section of the 12th chapter of the Revised Statutes; with this exception, that it adds, for the first time, *Mayors of Cities* to the list of those by whom an armed force may be called out.

These sections are as follows.

Sect. 27. 'Whenever there shall be, in any county, any tumult, riot, mob, or any body of men acting together, by force, with intent to commit any felony, or to offer violence to persons or property, or by force and violence to break and resist the laws of this Commonwealth, or any such tumult, riot or mob, shall be threatened, and the fact be made to appear to the commander-in-chief, or the mayor of any city, or to any court of record sitting in said county, or if no such court be sitting therein, then to any justice of any such court, or if no such justice be within the county, then to the sheriff thereof, the commander-in-chief may issue his order, or such mayor, court, justice or sheriff, may issue his precept, directed to any commanding officer of any division, brigade, regiment, battalion or corps, to order his command, or any part thereof, describing the kind and number of troops, to appear at a time and place within specified, to aid the civil authority in suppressing such violence and supporting the laws, which precept, if issued by a court, shall be in substance as follows:

[L. S.] ——— ss. COMMONWEALTH OF MASSACHUSETTS.

To (insert the officer's title) A. B., commanding (insert his command)

Whereas, it has been made to appear to our justices of our ———, now holden at ———, within and for the county of ———, that (here insert one or more of the causes above mentioned) in our county of ———, and that military force is necessary to aid the civil authority in suppressing the same; now, therefore, we command you that you cause, (here state the number and kind of troops required,) armed, equipped, and with ammunition, as the law directs, and with proper officers, either attached to the troops or detailed by you, to parade at ———, on ———, then and there to obey such orders as may be given them, according to law. Hereof fail not at your peril, and have you there this writ, with your doings returned thereon.

Witness, &c. * * * And if the same be issued by any mayor, justice or sheriff, it should be under his hand and seal, and otherwise varied to suit the circumstances of the case.'

Sect. 29. 'Such troops shall appear at the time and place appointed, armed, &c., and shall obey and execute such orders as they may then and there receive, acco ding to law.'

The noticeable points of this statute are, that it allows a military force to be called out, not only when there is a riot, mob, &c., but whenever one is *threatened;* that it fixes the persons by whom the existence of the riot, &c., or the fact that one is threatened, shall be ascertained and determined; provides that the reason of calling out the military shall be stated in the order or precept; and then leaves the mode in which the troops shall be employed 'to the civil authority in suppressing violence, and supporting the laws,' to be fixed by the rules of the common law, or by other statutes.

If summoned according to the provisions of this statute, when they appear at the place named in the order or precept, they are lawfully assembled; the fact that a sufficient necessity existed for their assembling, is, so far as they are concerned, conclusively settled; and the question then arises, What may they lawfully do? To whose orders are they subjected? And how are such orders to be given?

In the first place, they have all the rights at common law, or under the general laws of the Commonwealth, which other citizens possess. 'It is clear,' in the language of an eminent Judge, 'that the military do not lose the rights, and are not exempt from the duties of subjects, by entering into that condition.'

They may occupy the place at which they were directed to appear, so

long as by the orders which they may have received from the governor, judge of a court, sheriff, or mayor, or as they may there receive from any lawful authority, they are required to remain. They may march through the streets as on other occasions, not interfering with the reasonable use of the same by other persons; they may act in defence of their own persons and lives, if attacked or assaulted, using such force as is necessary and proper to repel the assailants.

They are not disqualified to act as the assistants of any civil officer, who has the right to call on the citizens to aid him in the service of any process, civil or criminal, or in the execution of his duty under the laws; and although their being engaged in military service would be a sufficient excuse for not obeying any call upon them as individual citizens, by a person not authorized to direct the movements of the collective force, yet if they should obey the call, their acts would be in no degree unlawful, so far as those persons might be concerned against whom their acts were directed. If, without objection from their commanding officer, and without interfering with their obedience to any lawful orders given them, any of them should act as individuals to prevent a breach of the peace, or to stay a rioter, or arrest a felon, the right to do so would be as unquestionable as if they wore a different dress. For every injury done to them, or indignity offered, the offending person is, and ought to be, civilly and criminally responsible, as for a like offence to any other citizen; and with this aggravation of the wrong, that the very position which the soldier occupies, and the nature of his duties, may render it difficult for him to detect the offender, and take from him the power to make any resistance to the crime.

I come, then, gentlemen, to the consideration of the farther powers for suppressing tumults and enforcing the laws, which are contained in the 129th chapter of the Revised Statutes.

The first section provides that if persons, to the number of twelve or more, being armed, or to the number of thirty, whether armed or not, shall be unlawfully, tumultuously, or riotously assembled in any city or town, the mayor and each of the aldermen of such city, and each of the selectmen of such town, and every justice of the peace therein, and the sheriff and his deputies, shall go among or near the persons so assembled, and require them to disperse; and if they do not disperse, then to command the assistance of all persons present in arresting the offenders. The second and third sections provide for the punishment of officers neglecting or refusing to act, and of other persons who refuse or neglect to assist.

The fourth section authorizes any two of the officers before named, on the refusal or neglect of the unlawful assembly to disperse, to require the aid of a sufficient number of persons, in arms or otherwise, and to 'proceed, *in such manner as in their judgment shall seem expedient*, forthwith to disperse' the assembly, and arrest the persons composing it.

The fifth section is as follows.

'Whenever an armed force shall be called out, in the manner provided by the 12th chapter, for the purpose of suppressing any tumult or riot, or to disperse any body of men, acting together, by force, and with intent to commit any felony, or to offer violence to persons or property, or with intent, by force and violence, to resist or oppose the execution of the laws of this commonwealth, such armed force, when they shall arrive at the place of such unlawful, riotous or tumultuous assembly, shall obey such orders for suppressing the riot or tumult, and for dispersing and arresting all the persons who are committing any of the said offences, as they may have received from the governor, or from any judge of a court of record, or the sheriff of the county, and also such further orders as they shall

there receive from any two of the magistrates or officers mentioned in the first section.'

The sixth section, which is by a subsequent statute (1839, chap. 54, § 1,) extended to all cases under the two preceding sections, provides that if by reason of the efforts made by any two of the said officers or magistrates, or by their direction, to suppress the unlawful assembly, &c., any person, though but a spectator, should be killed, the said magistrates and officers, and all persons acting under them, shall be held guiltless; and, that if the officers or their assistants, or persons acting by their order, should be killed or wounded, all the rioters, and all persons who had refused to assist the magistrates or officers, shall be held answerable.

It is apparent, from this statute, that it applies only to cases where a riot, tumult, unlawful assembly or body of men, collected with intent to do the unlawful acts referred to, actually *exists*. It authorizes no forcible acts, by way of precaution. And, gentlemen, none are authorized by law. The power to call out a military force, and hold them in readiness for the emergency when it shall arise, is given by the statute of 1840, to which I have previously referred. But the power extends no farther. And, as a practical rule, which will be decisive of some questions that may come before you, I shall instruct you, that

There is no law in this Commonwealth by which any district, or part of a city or town, can be put into the possession of a military force in time of peace, with power to obstruct the ordinary and reasonable use of the public ways, and to prevent peaceable citizens from transacting their lawful business — merely on account of an anticipated riot.

The fact that a riot has previously taken place, unless it be continuous and existing, will not alter the rule of law. And if it shall be made to appear to you that a military force has been so employed within the county of Suffolk, and any man has been assaulted or injured thereby, or forcibly prevented from enjoying his ordinary rights as a citizen, without other justification under the law, then every soldier who may have committed any such act of violence, and every officer, military or civil, who shall have ordered, requested, caused, or procured it to be done, is subject only to the qualification which I shall presently state, to be held responsible therefor.

But it is asked, whether, in a case where no man doubts that a riot or unlawful assembly is impending, the civil and military commanders are obliged to wait until irreparable mischief is done, till a prisoner is rescued, a building destroyed, or blood spilled before they can fully interpose? A sufficient answer may perhaps be found in the statement, that they may employ all the ordinary and peaceable means of enforcing the civil authority, and may have in readiness for instant employment, any amount of military force which the exigency shall demand. Further than this the law does not go, and the magistrate or officer cannot. It may seem to many worthy and prudent men that more power should be granted — but it has not been thought necessary or expedient by the framers of our constitution and laws. The principle of American institutions is not restraint — nor intimidation — but responsibility for acts done. In relation to freedom of speech, for example, and of the press, we do not, as in some countries it is done, establish a censorship, and determine beforehand what shall be spoken or published, but we leave men free to say or print what they please, and hold them accountable for any abuse of the liberty.

In the next place, gentlemen, the statute confers *no discretionary power* upon any military officer, under the commander-in-chief, nor can any be lawfully conferred upon him, except as to the details of executing a specific service, upon which he is lawfully ordered. And this is in strict

conformity with the requirements of the Constitution, "that the military power shall always be held in exact subordination to the civil authority, and be governed by it." It is for the civil magistrates only to determine whether an unlawful assembly exists, and whether military power is needed to suppress it. If any civil magistrate should direct the commander of a military force, lawfully called out to aid in suppressing an anticipated riot, to take possession of a city or district, dispose his force therein as he should think expedient, and then, whenever in his judgment a riot should commence, or an unlawful assembly be gathered, to fire upon or disperse it — leaving the whole question of the occasion and necessity to the discretion of the commander — such an order would be of no legal validity, and the military officer could not justify any act done under it, which would not have been legally justifiable if no such order had been given.

The details of military service must, of course, be left to the officer commanding the troops — but the service required must be designated by the civil authority. Thus when a riot exists, the civil magistrates competent to act, may say to the officer, clear this street — dislodge the occupants of this building — disperse this assembly — arrest these rioters — protect these buildings — and the officer receiving the order may employ his force to execute it in such a manner as he may think best. He may send one file of men or ten; he may charge with bayonets or sabres; he may fire blank cartridges or bullets; he may, unless the order is countermanded, decide how many times he shall charge or fire, and when the assembly is sufficiently dispersed. But a general direction to preserve the peace of a city, and sustain the laws, can give to a military force no new protection or power.

On the other hand, if the orders given proceed from a competent civil authority, — although, in my judgment, the law clearly contemplates that the resources of the civil power should usually be applied so far as they reasonably can be, before resort is had to the military, yet a discretion is given to the civil magistrates to determine when military force is needed — and even if they have judged erroneously, the soldier who obeys these orders is protected — and the correctness of the decision cannot be questioned to his prejudice.

The statute further provides, that the discretion in the use of an armed force which it confers, shall be exercised by two of the officers named in the first section jointly. It cannot be assumed by one alone. And further, the action of the two must be direct and positive. It is not sufficient that one shall be merely consulted by the other, and approve, or not object. Both must act. Both must assume the responsibility. It must be the order of both. Not that both must speak or write, but if one speaks for the two, it must be with a direct authority to speak in the name of the other.

The law plainly requires that both should be *present*. Not, of course, that they should be between the soldiers and the mob, not that they should ride with the military commander, or charge with his troops, — but *present*, in a reasonable sense of that phrase, applicable to the nature of the case; *present*, as a commander is present on the field of battle; *present*, so that they can have personal cognizance of the fact that military force is necessary; that they may direct its application, and be enabled to decide upon new exigencies as they arise, and to determine when the terrible necessity is ended.

There is, in my judgment, a strong and clear implication, from the language of the 12th and 129th chapters of the Revised Statutes, although not so distinctly expressed as would be desirable, that the governor, judge of a court of record in any county, or sheriff, may not only call out the

militia, but, in case of an existing riot, may give specific orders in regard to its suppression. This view is confirmed by the statutes of 1839, chap. 51, sect. 1, of which a part of the provisions could hardly have any intelligible effect, if it were not so. It is the general duty of the governor to cause the laws to be executed, and it is a common thing to invest the judge of a court of record with powers which it requires two inferior magistrates to exercise. It also seems to me that the actual presence of these higher officers of the State, could not be contemplated or required. They must act upon evidence and information; and the legislature must have supposed that the nature of their ordinary duties, and their relation to the Commonwealth, would insure a competent knowledge of their legal power, and caution in its exercise.

The question has, I believe, no immediate practical bearing — but a statement of it seemed necessary to a complete view of the subject.

In Suffolk county, it could hardly arise, except in the case of the governor or a judge; as there is probably never a time when some judge of a court of record is not found within this city, and the sheriff would not therefore be called upon to act alone.

Another question, of much practical importance, is, how far the private soldier, or the inferior officer, is answerable for an act of violence done in obedience to the command of his superior, that command being given without lawful authority? If a captain order his company, who have been lawfully called out to aid the civil authority, to fire upon a crowd, or to drive back any persons who are passing along or across a street, or to clear a building, or the like, and the captain has no order from the commander of the force which would authorize him to give such a direction, or the commander himself has no legal authority from the civil magistrates, would the private soldier, who should in good faith obey the order, be protected? Unquestionably the person with whom the illegal order originated, would be responsible to the fullest extent; and in respect to the subordinate, I shall instruct you substantially in the language of a recent decision of the Supreme Court of the United States.[1]

Upon authority, and upon principle, independent of the weight of judicial decision, it can never be maintained that a soldier or military officer can justify himself for doing an unlawful act, by producing the order of his superior. The order may palliate, but it can not justify. If the power exercised by the superior were within the limits of a discretion confided to him by law, the inferior would be justified by the order, even if the commander had abused his power. But I have already said that the law does not confide to him a discretionary power, except as to the mode of executing the lawful commands of the civil authorities. But there are cases when the soldier may be called upon to act in a sudden emergency without the possibility of learning with absolute certainty the origin of the orders given him. If, in such a case, the subordinate acts in *good faith* and with *due diligence*, acting upon such information as he had a right to rely upon, and upon all the information reasonably in his power to obtain, and which, if reliable, would render his act legal, the order of his superior will exonerate him from any *criminal* responsibility, although the information should afterward be discovered to be false or erroneous.

A point which may incidentally arise, respects the occasion upon which the troops were called out on the 2d of June last. It may be found that they were called out in aid of the civil authority, to preserve the peace of the city, which was endangered by a threatened resistance to the execution of a process of the United States. A few words upon this subject are all that are necessary.

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[1] *Mitchell* v. *Harmony*, 13 Howard, U. S. R. 137.

We are all of us not only citizens of Massachusetts, but citizens of the United States. Our relation to the government of the United States is a relation as individuals, except where the constitution and laws of the Union have otherwise specially provided. The State militia cannot, as an organized force, be legally called into the service of the United States, except by a requisition of the President of the United States upon the governor, and according to the constitution and laws.

Our State officers have nothing to do, in their official capacity, with executing the laws of the United States. United States officers, if resisted in the discharge of their duty, may call upon citizens of the State to aid them in executing process, and it would be the duty and right of each citizen to obey the call, unless he were lawfully excused. A lawful excuse would be, that the person whose aid was required was engaged in a public duty under the government of the State. Congress may confer upon officers of the United States, powers to prescribe duties which are analogous to those of certain classes of State officers; but this can apply only to the discharge of their official duties under the laws of the United States, and can give them no authority to interfere with the execution of State laws, or to control or exercise any authority over any State organization, or to assume the specific functions of any State officer.

But, on the other hand, all acts done by an officer of the United States in the discharge of his duty, are to be regarded as lawfully done under the laws of a State. And if, in resisting the execution of the laws of the United States, any breach of the peace should occur, or any other violation of State laws, it is the duty of the State officers to repress or punish it as they would if it were happening to the injury or disturbance of any other citizens lawfully employed.

Thus, to apply these principles, the United States Marshal of a district has no official relation, as such, to a Massachusetts justice of the peace, or to the mayor of a city, or sheriff of a county. He cannot call out the militia of a State, nor give them any legal order when mustered, either alone or in concurrence with any State officer. Although Congress has conferred upon him the authority of a sheriff, this obviously can only mean the same functions in executing the laws of the United States that a sheriff has in relation to the laws of a State. He cannot serve a writ from a State court, nor undertake to execute a State law. But these principles are too clear and well settled to require further illustration. And now, gentlemen, it remains for you to apply the rules of law which I have given you.

If our citizen-soldiers, lawfully mustered in the public service, have been assaulted or injured, see to it that the aggressor, if he can be discovered, shall not go unpunished.

If it shall be made to appear to you that any assault has been committed, or violence done, or forcible obstruction of lawful business occasioned by any part of the military force, 'diligently inquire, and true presentment make,' concerning it. Ascertain under what order, or by what authority it was done. Trace it to its source. Consider what is its justification. Extend the full protection of the law to every thing which a liberal construction of the law can justify or excuse. But if you find the law has been violated, and that there has been an invasion of private rights, or an infringement of public liberty, do your duty, as you have sworn to do it — and 'leave no man unpresented, for love, fear, favor, affection, or hope of reward.'

It may be said, that there was a great public exigency, an imminent danger; that riot and bloodshed were prevented; that there has been no considerable destruction of property, no serious personal injury inflicted, no sacrifice of life; and that it would be harsh and unwise to subject to

criminal responsibility those who have acted with general good intention. Gentlemen, this is a very superficial view of the matter. All right-minded men are opposed to lawless violence. The whole community cry out against it. But when law is disregarded by its own guardians and supporters, it is 'wounded in the house of its friends,' and all sentiments of reverence for law in the public mind are weakened.

The old Latin maxim tells us, Oppose beginnings — '*Obsta principiis.*' Occasions where the gravest consequences have not followed, and the strongest passions are not excited, are the best to establish principles and define duties.

And if the facts which shall be laid before you require it, I have no doubt, gentlemen, that you will be ready to show to the people of the State, that laws are not made for those only who crowd the gallery or fill the dock; that whenever the strong arm of power has been raised without justification, and any citizen has suffered in his person or property, the whole community feels the wound, and that the justice which is no respecter of persons will allow no military or civil title to give immunity to the transgressor."

THE "CHEAP SHOP" AND THE "FAST" COURT. — Lord Brougham was last week complaining to the House of Lords of the heavy fees in the county courts, and comparing the cost there with the cost of obtaining a judgment in the superior courts, greatly to the advantage of the latter, when Lord Campbell, who has a deal of fun lurking under his good sense, interrupted the orator with the remark, that "Ours is the cheap shop after all"

A few days before, in a debate upon the Ecclesiastical Courts Bill, an objection to the transfer of the business to the Court of Chancery was raised, upon the assumption that there was a holy horror of that court, because, once in it, it is very difficult to get out of it; whereupon Lord St. Leonards (no mean authority) and the Lord Chancellor protested that this objection, however applicable to Chancery as it was, had no validity against the court as it *is;* for that, in its reformed state, in no court in the kingdom could a decision be obtained *so quickly* as now in the Court of Chancery.

Strange as it may appear, both of these assertions are strictly true. It it a fact — and not the least remarkable of the changes our time has witnessed — that the superior courts of common law at Westminster, are now, as Lord Campbell jocosely termed them, "the *cheap* shops;" and the courts of equity, "the *fast* courts." You can obtain a judgment in the Queen's Bench at less cost, and in the Court of Chancery in less time, than in any other courts in the kingdom.

When the county courts were established, they were welcomed as vast improvements. You could obtain judgment there in a month, and at a cost of two or three pounds. But the other courts have taken a lesson from their younger rivals, and improved the teaching; and now they have positively beaten them in the race. You can go to the Queen's Bench with an undisputed demand, and obtain judgment and execution in ten days, at a cost of about thirty-six shillings; whereas in the County Court, even if your demand is undisputed, you must wait till the court sits perhaps for a whole month, and then you must go with all your witnesses, at great cost and inconvenience, to prove your claim, and you must pay fees greater than the entire cost of obtaining judgment in the Superior Court, and, after all this, you will probably be deprived of the fruit of the judgment you have paid for so heavily, by an order that the defendant shall pay by instalments, giving you the trouble of a monthly search to ascer-

tain if he has paid, and, if he fails, putting you to the cost and trouble of taking out another summons, which must be served personally, and of again appearing at the court to enforce it.

All these obstacles to justice have been removed from the Superior Courts, so that now they offer immense advantages over the County Courts for the recovery of undisputed demands. It is otherwise with disputed claims. There the Superior Courts put themselves under comparative disadvantages by appointing but two seasons in the whole year for trials. It is of little use to suitors to facilitate process, if, after the preliminaries are completed in a fortnight, they must wait six months before they can have a trial. Let the Superior Courts remove this last remaining impediment to their perfect adaptation to the requirements of the community, and Lord CAMPBELL might add the boast of Lord ST. LEONARDS, in regard to the Equity Courts, to his own, and say of them that they are *both cheap and fast*.

And the Court of Chancery *is* "a fast" court. You can file a claim, and not impossibly obtain a hearing and decree, in a fortnight. This dispatch of business has been much facilitated by the practice of distributing it about among the several Courts, so as to equalize the work as nearly as possible. If this practice were introduced into the Common Law Courts, as we have respectfully ventured to recommend, the same results would doubtless be seen.

The public are profoundly ignorant of these results of the recent law reforms. The Courts cannot get rid of the ill name that clings to them, and it will be a long time, perhaps, before they do so. But even the lawyers are scarcely conscious what a revolution has been accomplished, especially in the Court of Chancery; and we have directed their attention to it thus pointedly, that they may turn it to such uses, for the benefit of their clients, as their experience will show might be made in many ways of a procedure at once so speedy and so cheap. — *From the Law Times of April 22d.*

MARINE COURT — *Before Judge Thompson.* Claim for procuring a marriage. George Hiltman, assignee of Degroot, against H. Stickler, to recover $125 for alleged work, and labor and services. For the defence Mr. Degroot was put upon the stand. It turned out that he introduced defendant to a young German girl, who had $1000, and as he did not choose to marry her himself, he undertook to induce her to marry defendant in consideration that the latter should pay him after being married $125. The defendant agreed to the proposal, and married the young lady. After the marriage, however, he declined to pay the $125. It was contended, in defence, that the consideration was illegal and contrary to good morals. The Judge took that view of the case and dismissed the complaint. — *N. Y. Tribune.*

Notices of New Books.

AN INTRODUCTION TO THE STUDY OF THE ROMAN LAW. By LUTHER S. CUSHING. 1 vol. pp. 243. Boston: Little, Brown & Company, 1854.

This is a modest and unpretending, but most interesting and useful volume. It supplies a want which has long existed. In a plain, perspicuous, and intelligible manner, it furnishes an introduction to the study of

the Roman Law; so clear and attractive that the student wishes to learn more, and has the path made straight before him; and yet so full that if the reader only masters thoroughly the contents of the volume, he will have a general knowledge and idea of the Roman law, its administration, literature and history. Even beyond this, the work is valuable as a glossary of many of the terms of the civil and Roman law in common use, for its very full chapter upon the mode of referring to or citing the books of the Roman law; and for its appendix, containing a table of the subjects of the several titles of the Institutes, Digest and Code, arranged in alphabetical order.

The work was originally prepared as a short course of lectures before the students of the Dane Law School, where, in 1848–49, the author was a special instructer. The plan of the treatise is thus stated: "Considering then that a thorough knowledge of it, [the Roman law] is entirely out of the question, as a branch of preliminary education in this country, two alternatives remain; either to present a general and brief outline of the system, or to explain so much and such parts of it, as to enable the student to prosecute the study further, if he may think proper. The latter course there can be no doubt, will be altogether the most advantageous. It will be the purpose of this introduction, therefore, not so much to explore the vast field of the Roman law, as to point out the way by which the student of jurisprudence may do it for himself." In carrying out this plan, the author first explains and defines the terms Roman law and civil law; then states the distinction between legislation and jurisprudence; then gives in separate chapters the history of Roman legislation and jurisprudence anterior to the time of Justinian; then the revision of the Roman law by Justinian; the account of the law schools in the time of Justinian; the legislation of the conquerors of the western empire; the history of the Roman law since the time of Justinian. The other chapters of the volume explain the mode of citing treatises on the Roman law, and state fairly, and not too strongly, the utility of its study.

The chapters on the history of Roman legislation and jurisprudence are prepared with special care. Enough is given to explain and interest, but not so much as to weary. We think that the publication of this volume will do much to instruct the profession in the history, principles and literature of the Roman law; to be entirely conversant with which is an accomplishment which few lawyers in those States where the common law prevails, can be expected to attain, but to be entirely unacquainted with which, now that this volume is published, is to be disgracefully ignorant.

THE EXCHEQUER REPORTS. Reports of Cases argued and determined in the Courts of Exchequer and Exchequer Chamber, Vol. VIII. Trinity Vacation, 15 Vict., to Trinity Term, 16 Vict., both inclusive. By W. W. WELSBY, E. F. HURLSTONE, and J. GORDON. With references to decisions in the American Courts. J. I. CLARK HARE, Editor. pp. 958. Philadelphia: T. & J. W. Johnson, Law Booksellers., No. 197 Chestnut Street. 1854.

We have already frequently expressed our opinion of the value of this series of reports. And the present volume, both as regards the reported cases, and its careful preparation, and the full notes, by the American editor, is equal to any of the preceding ones. We have room to refer to but one or two of the cases; and there is but little need to do so, as these reports are found upon the table of most lawyers. *The Great Northern Railway Company* v. *Shepherd*, p. 30, is a decision as to the liability of

carriers of passengers, at common law, for the luggage of passengers. The court hold that the carrier is responsible for the *personal* luggage only, and not for merchandise among the personal luggage; but he is liable for merchandise when it is carried openly, or so packed that its nature is obvious, unless he objects to carry it. The case also decides a point which the railroad company must have been hard pressed to take, that, where the statute allows each passenger to carry half a hundred weight of luggage, a husband and wife travelling together are entitled to carry one hundred weight. The judges further held, that the luggage of a passenger by railway, though never delivered to any servant of the company, but kept by the passenger during the journey, is nevertheless, in point of law, in the custody of the company, so as to render them responsible for its loss.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Abbott, Thomas R.	North Reading,	May 18,	Asa F. Lawrence.
Adams, Amos	North Brookfield,	" 2,	Alexander H. Bullock.
Allen, George L.	Worcester,	" 22,	Alexander H. Bullock.
Bailey, Charles F. et al.	Newton,	" 15,	Asa F. Lawrence.
Barrett, Francis	Weymouth,	" 11,	Francis Hilliard.
Bartlett, George W.	Chelsea,	" 5,	John P. Putnam.
Belcher, Philander J.	Holliston,	" 1,	Asa F. Lawrence.
Berry, Henry	Andover,	" 29,	John G. King.
Bisbee, Joseph E	East Bridgewater,	" 16,	Welcome Young.
Bodwell, Nathaniel	Woburn,	" 27,	Asa F. Lawrence.
Deane, Harrison G. et al.	Newton,	" 15,	Asa F. Lawrence.
Dearborn, Edward	Amesbury,	" 11,	N. W. Harmon.
Dexter, Alvan et al.	Boston,	" 4,	John P. Putnam.
Dexter, John B. et al.	Boston,	" 4,	John P. Putnam.
Dobson, Isaac F.	Boston,	" 1,	John P. Putnam.
Dodge, George W.	Worcester,	" 3,	Alexander H. Bullock.
Freeman, Francis	Winchester,	" 26,	Asa F. Lawrence.
Fuller, Joseph N.	Deerfield,	" 6,	David Aiken.
Gay, Caleb	Walpole,	" 22,	Samuel B. Noyes.
Gerrish, Samuel	Cambridge,	" 13,	Asa F. Lawrence.
Goddard, Salmon	Royalston,	" 3,	C. H. B. Snow.
Hixon, Timothy W.	Boston,	" 4,	John P. Putnam.
Hoyt, William L.	Lowell,	" 29,	Isaac S. Morse.
Johnstone, Francis	Lawrence,	" 2,	N. W. Harmon.
Jordan, Stephen D.	New Bedford,	" 19,	E. P. Hathaway.
Kingman, Cyrus B.	North Bridgewater,	" 8,	Welcome Young.
Locke, Oliver A.	Dorchester,	" 18,	John M. Williams.
Moody, Henry L.	Newbury,	" 3,	N. W. Harmon.
Nason, Justain et al.	Lowell,	" 29,	Isaac S. Morse.
Pearson, Joseph L.	Lawrence,	" 18,	N. W. Harmon.
Pomfret, James E.	Haverhill,	April 12,	N. W. Harmon.
Pratt, Chandler M. et al.	Grafton,	May 30,	Alexander H. Bullock.
Putnam, Francis	Salem,	" 4,	N. W. Harmon.
Quimby, Enoch R.	Lynn,	" 28,	John G. King.
Richardson, Joseph P.	Woburn,	" 3,	Asa F. Lawrence.
Russell, Levi H.	Dedham,	June 1,	Samuel B. Noyes.
Saurin, Thomas J.	Somerville,	May 8,	Asa F. Lawrence.
Smith, Asa F. et al.	Grafton,	" 30,	Alexander H. Bullock.
Sprague, Henry E.	Lowell,	" 8,	Isaac S. Morse.
Sweetser, Moses	Newburyport,	" 18,	N. W. Harmon.
Tay, Francis S.	Malden,	" 22,	Josiah Rutter.
Wellman, Sumner	Brighton,	" 16,	Josiah Rutter.
Wilkins, Rufus	Marlborough,	" 13,	Asa F. Lawrence.